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Article

The Arbitration Rules: Procedural Rulemaking by Arbitration Providers

David Horton[†]

INTRODUCTION

In 2019, the U.S. Supreme Court decided *Lamps Plus, Inc. v. Varela*,¹ its latest controversial opinion about class actions and the Federal Arbitration Act (FAA).² A hacker had stolen the personal information of 1,300 employees at Lamps Plus, a major lighting retailer, and used it to file fraudulent tax returns in their names.³ Frank Varela, a victim of the scam, brought a class action against Lamps Plus in federal court in California for negligence and violation of federal and state statutes.⁴ But to initially obtain his job, Varela had needed to sign a contract in which he agreed to arbitrate “all claims or controversies . . . that [he] may have against the [c]ompany.”⁵

Varela and Lamps Plus disagreed about whether this language—which did not mention class actions—allowed Varela to pursue class claims in arbitration.⁶ The district court and the Ninth Circuit applied California contract law to construe the ambiguity against Lamps Plus and hold that the clause authorized class arbitration.⁷

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1. 139 S. Ct. 1407.

2. 9 U.S.C. § 2.

3. Class Action Complaint at ¶¶ 1, 3, *Varela v. Lamps Plus, Inc.*, No. 5:16-cv-00577 (C.D. Cal. Mar. 29, 2016).

4. *Id.* at ¶¶ 51–103.

5. *Varela v. Lamps Plus, Inc.*, No. CV 16-577, 2016 WL 9110161, at *1 (C.D. Cal. July 7, 2016).

6. *See id.* at *6.

7. *See id.* at *7 (“[T]he drafter of an adhesion contract must be held responsible for any ambiguity in the agreement.”); *Varela v. Lamps Plus, Inc.*, 701 F. App’x 670, 673 (9th Cir. 2017) (“State contract principles require construction against Lamps Plus, the drafter of the adhesive Agreement.”).

However, the Supreme Court saw the issue through a different prism.⁸ Speaking through Chief Justice Roberts, the Court explained that Congress passed the FAA to facilitate simple, fast, and cheap dispute resolution.⁹ In turn, the Court reasoned, class arbitration “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”¹⁰ Thus, the Court concluded that California contract principles were irrelevant and that the FAA “requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis.”¹¹

Lamps Plus provoked strong reactions. Each liberal Justice wrote his or her own dissent.¹² For example, Justice Ginsburg objected that because virtually no consumers and employees will prosecute their own claims, “mandating single-file arbitration serves as a means of erasing rights.”¹³ Justice Kagan condemned the majority for ignoring the fact that the FAA embraces—rather than eclipses—state contract principles such as California’s interpretation-against-the-drafter doctrine.¹⁴ Justice Sotomayor observed that nobody who signs a simple arbitration provision like Frank Varela’s will realize that they are forfeiting their ability to represent a class.¹⁵ Likewise, critics called *Lamps Plus* a “revolution” in the Court’s FAA jurisprudence.¹⁶ They argued that because the opinion transforms all arbitration provisions into class action bans, corporations can “rip you off and do it legally.”¹⁷

8. See *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019).

9. See *id.* at 1416 (“[T]he virtues Congress originally saw in arbitration [were] its speed and simplicity and inexpensiveness . . .” (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018))).

10. *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011)).

11. *Id.* at 1415.

12. See *id.* at 1420–22 (Ginsburg, J., dissenting); *id.* at 1422–27 (Breyer, J., dissenting); *id.* at 1427–28 (Sotomayor, J., dissenting); *id.* at 1428–35 (Kagan, J., dissenting).

13. *Id.* at 1421 (Ginsburg, J., dissenting) (quoting Judith Resnik, *Revising Our “Common Intellectual Heritage”: Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1888 (2016)).

14. See *id.* at 1428 (Kagan, J., dissenting).

15. See *id.* at 1427 (Sotomayor, J., dissenting) (“[A]n employee who signs an arbitration agreement should not be expected to realize that she is giving up access to [class actions].”). Justice Breyer joined Justices Ginsburg’s and Kagan’s dissents, and also wrote separately to opine that the Ninth Circuit lacked jurisdiction to hear the appeal. See *id.* at 1422–27 (Breyer, J., dissenting) (“Consequently, I would hold that we lack jurisdiction over this case.”).

16. Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1160 (2019).

17. Chris Jenkins, *How Your Bank, Others Can Rip You Off and Do It Legally*, CIN. ENQUIRER: OP. (Sept. 18, 2019), <https://www.cincinnati.com/story/opinion/2019/08/>

But for some consumers and employees, *Lamps Plus* changed nothing. Years earlier, they had lost their ability to bring a class arbitration even though they, like Frank Varela, were bound by arbitration clauses that did not mention class actions. The decision to delete their rights did not generate headlines and was neither handed down by a judge nor announced in Congress. Instead, it was made in an office building in Garden City, New York¹⁸ An entity called National Arbitration and Mediation (NAM), which administers arbitrations, adopted an internal rule that bars class actions “[i]f the [a]rbitration agreement is silent with respect to [them].”¹⁹ Thus, anyone whose arbitration agreement merely selected NAM to handle the case had signed a clandestine class action waiver.

* * *

In 2015, Dr. Jensine Andresen sued her former employer for violating federal and state employment statutes.²⁰ She alleged that her supervisor had sexually harassed her, discriminated against her because of her gender and age, and illegally withheld her overtime pay.²¹

26/opinion-how-your-bank-others-can-rip-you-off-and-do-legally/2010003001 [https://perma.cc/Z8KA-E6D7]; see also James Bogan III & Allen Garrett Jr., *Class Arbitration Is—Almost—Dead*, JD SUPRA (July 22, 2019), https://www.jdsupra.com/legalnews/class-arbitration-is-almost-dead-60871 [https://perma.cc/6GJ5-CDGQ] (explaining how *Lamps Plus* decision “refused to address whether class arbitration constitutes a ‘question of arbitrability’ presumptively for courts, rather than arbitrators, to decide”); Bloomberg, *Supreme Court Gives Businesses More Power to Require Individual Arbitration*, L.A. TIMES (Apr. 24, 2019, 1:49 PM), https://www.latimes.com/business/la-fi-arbitration-supreme-court-class-action-lamps-plus-20190424-story.html [https://web.archive.org/web/20190426041600/https://www.latimes.com/business/la-fi-arbitration-supreme-court-class-action-lamps-plus-20190424-story.html] (explaining that *Lamps Plus* “help[s] companies avoid the prospect of costly class actions filed by workers and consumers”); Adam Liptak, *Split 5 to 4, Supreme Court Deals a Blow to Class Arbitrations*, N.Y. TIMES (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/us/politics/supreme-court-class-arbitrations.html [https://perma.cc/KU55-LPWG] (noting that decisions like *Lamps Plus* “can make it difficult for consumers and workers to pursue minor claims even where their collective harm was substantial”).

18. *Conference Facilities Nationwide*, NAT’L ARB. & MEDIATION, https://www.namadr.com/about/locations [https://perma.cc/2DEY-PX43] (explaining location of National Arbitration and Mediation’s headquarters).

19. NAT’L ARB. & MEDIATION, EMPLOYMENT RULES AND PROCEDURES r.12.f.iii, at 8 (2017) [hereinafter NAM EMPLOYMENT RULES], https://www.namadr.com/content/uploads/2016/07/Emp-Rules_and_Proced.pdf [https://perma.cc/9Q7R-BWHY]. For information on the location of NAM’s offices, see *Contact Us*, NAT’L ARB. & MEDIATION, https://www.namadr.com/about/contact-us [https://perma.cc/YUZ8-C9PX].

20. See Complaint for Declaratory, Injunctive, and Monetary Relief and Jury Demand ¶¶ 204–31, *Andresen v. IntePros Fed. Inc.*, No. 1:15-cv-00446 (D.D.C. Mar. 26, 2015).

21. See *id.*

But when Dr. Andresen had accepted her position, she had signed a contract that required any future dispute to be “determined by arbitration [in] . . . the American Arbitration Association [(AAA)] in accordance with the Commercial Arbitration Rules.”²²

This single sentence transformed the procedural landscape of Andresen’s case. Not only did it mandate arbitration, but it selected a procedural code—the AAA’s Commercial Rules—that was designed to govern business-to-business disputes²³ and thus was inhospitable to Dr. Andresen’s employment claims. For example, Dr. Andresen would have only needed to pay \$400 to bring her lawsuit in the judicial system.²⁴ Conversely, the AAA Rules saddled her with a \$7,500 filing fee and a minimum of \$8,200 in other expenses, including the cost of the arbitrator’s salary and renting a room for the hearing.²⁵ Dr. Andresen asked a federal court to nullify the arbitration clause, arguing that she must “pay rent, pay a mortgage, pay credit card debt, and pay for utilities, while relying on a modest monthly salary.”²⁶ Yet AAA Commercial Rule 7(a) states that “[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement”²⁷ Thus, as paradoxical as it sounds, the court held that the AAA Rules required Dr. Andresen to arbitrate the very question of whether she needed to arbitrate the merits of her lawsuit.²⁸

* * *

In September 2019, nearly 4,000 food delivery couriers filed separate arbitrations alleging that food delivery service DoorDash had

22. *Andresen v. IntePros Fed., Inc.*, 240 F. Supp. 3d 143, 147 (D.D.C. 2017).

23. AM. ARB. ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 10 (2016) [hereinafter AAA COMMERCIAL RULES], <https://www.adr.org/sites/default/files/Commercial%20Rules.pdf> [<https://perma.cc/ZL6E-NEW4>] (observing that the Commercial Rules are not supposed to govern employment cases).

24. *Andresen*, 240 F. Supp. 3d at 158.

25. *See id.* at 157–58.

26. *Id.* at 158–59.

27. AAA COMMERCIAL RULES, *supra* note 23, at R7(a).

28. Under longstanding precedent, courts invalidate arbitration agreements that impose excessive costs and therefore thwart the plaintiff’s exercise of her federal statutory rights. *See Andresen*, 240 F. Supp. 3d at 154. Invoking this rule, the court forced Dr. Andresen’s employer to pay arbitration-specific costs related to her pursuit of her federal statutory claims. *See id.* at 163. However, the court refused to apply this rule to Dr. Andresen’s state statutory claims, thus tasking her with paying to arbitrate the question of whether it was unfair to compel her to arbitrate the merits of these allegations. *See id.* at 163 n.14.

violated state labor laws.²⁹ The plaintiffs admitted that they were bound by DoorDash's arbitration clause, which chose the AAA's Commercial Rules, and had waived their right to band together in a class action.³⁰ But the "Dashers" had initiated so many discrete claims that the AAA Rules saddled DoorDash with a pre-hearing deposit of \$11 million.³¹ DoorDash refused to pay, prompting the AAA to terminate the arbitrations.³² As a result, the plaintiffs found themselves in limbo: contractually bound to arbitrate, but blocked from pursuing their cases in that forum.³³

* * *

In 1934, Congress passed the Rules Enabling Act, which instructed the Supreme Court to create "general rules of practice and procedure."³⁴ The Court delegated this task to an Advisory Committee of five law professors and nine lawyers.³⁵ This group set out to create a regime in which procedure receded into the background "so that cases could more easily be decided on the merits."³⁶ Its handiwork, the Federal Rules of Civil Procedure, went into effect in 1938.³⁷

At the risk of stating the obvious, the Federal Rules proved to be influential. About half of the states passed procedural codes modeled on the Rules, and even jurisdictions that did not copy the Committee's handiwork adopted schemes that "line[] up with federal court

29. Petitioner's Petition to Compel Arbitration; Memorandum of Points and Authorities in Support ¶ 1, *Boyd v. DoorDash, Inc.*, No. CPF-19-516930 (Cal. App. Dep't Super. Ct. Nov. 19, 2019) [hereinafter DoorDash Petition].

30. Independent Contractor Agreement, Declaration of Ashley Keller in Support of Petitioners' Motion for a Temporary Restraining Order and Order to Show Cause Ex. B at 7, *Boyd* (No. CPF-19-516930).

31. See *id.* at ¶¶ 18–19; Kathleen Dailey, *DoorDash Says Couriers Can't Block New Arbitration Agreements*, BLOOMBERG L. (Nov. 25, 2019), <https://news.bloomberglaw.com/daily-labor-report/door-dash-says-couriers-cant-block-new-arbitration-agreements> [<https://perma.cc/8875-HNEV>].

32. See DoorDash Petition, *supra* note 29, at ¶ 29.

33. See *id.* at ¶ 30.

34. 28 U.S.C. § 2072(a)–(b).

35. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 971 (1987).

36. *Id.* at 986; see also Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 288 (2013) ("[T]he distinguished proceduralists who drafted the Federal Rules believed in citizen access to the courts and in the resolution of disputes on their merits, not by tricks or traps or obfuscation.").

37. FED. R. CIV. P. historical note at vii (2019) ("The original rules, pursuant to act of June 19, 1934 . . . became effective September 16, 1938.").

practice.”³⁸ Thus, the Federal Rules dominate civil procedure so much that they are practically synonymous with the field. Most procedural scholarship and law reform focuses on the Federal Rules, and law students “learn[] about civil litigation through a Federal Rules filter.”³⁹

But Varela, Dr. Andresen, and thousands of DoorDashers did not have the benefit of these iconic procedural rules. In 1925, Congress passed the FAA to encourage merchants to resolve breach of contract disputes privately.⁴⁰ But in the 1980s, the Court hijacked the statute, holding that it preempts state law,⁴¹ governs federal statutory claims,⁴² and embodies a “liberal federal policy favoring arbitration.”⁴³ Forced arbitration clauses became “a phenomenon that pervade[s] virtually every corner of the daily economy.”⁴⁴ As a result, the FAA funnels tens of thousands of disputes each year into arbitration providers, such as NAM,⁴⁵ the AAA,⁴⁶ ADR Services, Inc.,⁴⁷ Alternative Resolution Centers (ARC),⁴⁸ the ADR Forum (Forum),⁴⁹ the International Institute for Conflict Prevention and Resolution (CPR),⁵⁰ Judicial Mediation and Arbitration Services (JAMS),⁵¹ Judicate West (JW),⁵² and

38. Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1049 (2016).

39. Subrin, *supra* note 35, at 910.

40. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14).

41. See *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984) (“We see nothing in the [FAA] indicating that [its] broad principle of enforceability is subject to any additional limitations under state law.”).

42. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (ordering arbitration of complex Sherman Act allegations).

43. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

44. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1429 (2008).

45. See *About*, NAT’L ARB. & MEDIATION, <https://www.namadr.com> [<https://perma.cc/6ZHC-GNDU>].

46. See *What We Do*, AM. ARB. ASS’N, <https://www.adr.org/Arbitration> [<https://perma.cc/U4XK-CDPT>].

47. See *About ADR Services, Inc.*, ADR SERVS., INC., <https://www.adrservices.com/about> [<https://perma.cc/9PJJ-XFPQ>].

48. See *About Us*, ALT. RESOL. CTRS., <https://www.arc4adr.com/about-us.php> [<https://perma.cc/P5SC-QZVE>].

49. See *About Us*, FORUM, <https://www.adrforum.com/about> [<https://perma.cc/56W3-2PPE>].

50. See *What We Do*, INT’L INST. FOR CONFLICT PREVENTION & RESOL., <https://www.cpradr.org/about> [<https://perma.cc/N45S-KYCW>].

51. See *About Us*, JAMS, <https://www.jamsadr.com/about> [<https://perma.cc/RWA8-4B3B>].

52. See *About Judicate West*, JUDICATE W., <https://www.judicatewest.com/Firm/About> [<https://perma.cc/D3FG-RKZ8>].

U.S. Arbitration and Mediation (USA&M).⁵³ In turn, these organizations have created their own procedural codes.⁵⁴ I call these private versions of federal and state rules of civil procedure the “Arbitration Rules.”

The Arbitration Rules are both important and poorly understood. The contracts of Fortune 500 companies like Amazon,⁵⁵ AT&T,⁵⁶

53. See *Arbitration*, U.S. ARB. & MEDIATION, <https://usam.com/arbitration> [<https://perma.cc/89EB-7UPR>].

54. See, e.g., AAA COMMERCIAL RULES, *supra* note 23; ADR SERVS., INC., ARBITRATION RULES (2017) [hereinafter ADR SERVICES RULES], <https://www.adrservices.com/wp-content/uploads/2017/04/ADR-ARBITRATION-RULES-Final-Version-4-11-17.pdf> [<https://perma.cc/9UNJ-5MY9>]; ALT. RESOL. CTRS., ARBITRATION RULES (2011) [hereinafter ARC RULES], https://www.arc4adr.com/forms/arbitration_rules.pdf [<https://perma.cc/P6NL-HP72>]; 2019 Administered Arbitration Rules, INT’L INST. FOR CONFLICT PREVENTION & RESOL. (Mar. 1, 2019) [hereinafter CPR Rules], <https://www.cpradr.org/resource-center/rules/arbitration/administered-arbitration-rules-2019> [<https://www.perma.cc/TK8W-W34U>]; FORUM, CODE OF PROCEDURE FOR RESOLVING BUSINESS-TO-BUSINESS DISPUTES (2019), https://www.adrforum.com/assets/resources/Arbitration/Rules/Forum.B2B_Rules.v2.3.pdf [<https://perma.cc/BN4M-WXZE>]; JAMS, COMPREHENSIVE ARBITRATION RULES & PROCEDURES (2014) [hereinafter JAMS COMPREHENSIVE RULES], <https://www.jamsadr.com/rules-comprehensive-arbitration> [<https://perma.cc/ZTQ4-XMTR>]; *Commercial Arbitration Rules*, JUDICATE W. [hereinafter JW Commercial Rules], <https://www.judicatemw.com/Resources/ArbitrationRules> [<https://perma.cc/YC5W-ZLU3>]; U.S. ARB. & MEDIATION, CONSOLIDATED ARBITRATION RULES (2019) [hereinafter USA&M RULES], <https://usam.com/wp-content/uploads/2019/03/consolidated-arbitration-rules-3.28.19.pdf> [<https://perma.cc/FW7U-A8YS>].

55. See *Conditions of Use*, AMAZON, https://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088 [<https://perma.cc/9S63-J49E>] (referring to AAA’s Supplementary Procedures for Consumer-Related Disputes).

56. See *Resolve a Dispute with AT&T Via Arbitration*, AT&T WIRELESS, <https://www.att.com/support/article/wireless/KM1045585> [<https://perma.cc/KQ8U-KN2A>] (referring to AAA’s Commercial Rules as modified by its Supplementary Procedure for Consumer Related Disputes).

CVS,⁵⁷ Exxon Mobile,⁵⁸ Federal Express,⁵⁹ General Motors,⁶⁰ Google,⁶¹ Verizon,⁶² Walgreens,⁶³ Walmart,⁶⁴ Wells Fargo,⁶⁵ and Xfinity⁶⁶ incorporate a specific set of Arbitration Rules by reference. Also, because providers deem any party who uses their services to have accepted their Arbitration Rules, their codes guide the path of most disputes they handle.⁶⁷ Finally, as the stories that begin this Article illustrate, the Arbitration Rules govern hot-button topics, such as the availability of class relief, the line between judicial and arbitral jurisdiction, and mass arbitrations.⁶⁸ Surprisingly, though, the Arbitration Rules have

57. See *Terms of Use*, CVS PHARMACY (March 21, 2019), https://www.cvs.com/help/terms_of_use.jsp [<https://perma.cc/EMA2-XYCW>] (referring to AAA Consumer Arbitration Rules).

58. See *Exxon Mobil Rewards+ Program Terms and Conditions*, EXXON MOBIL (July 11, 2018), <https://www.exxon.com/en/exxon-mobil-rewards-plus-terms> [<https://perma.cc/7MRR-QPKK>] (referring to AAA Consumer Arbitration Rules).

59. See *User Terms*, ONSTAR (May 1, 2018), https://www.onstar.com/us/en/user_terms [<https://perma.cc/RRK5-7RVC>] (referring to AAA Commercial Arbitration Rules).

60. See *FedEx Tech Manager Terms and Conditions*, FEDEX, <http://www.fedex.com/techmanager/terms> [<https://perma.cc/HZD8-TLCF>] (referring to AAA Commercial Rules).

61. See *Payment Methods & Terms of Service Finder*, GOOGLE, <https://www.google.com/ads/terms> (from “Product” drop-down, select “Google Ads”; from “Billing country” drop-down, select “United States (US)”; from “Currency” drop-down, select “US Dollar (\$)”) (referring to AAA Commercial Arbitration Rules).

62. See *My Verizon Wireless Customer Agreement*, VERIZON, <https://www.verizon.com/legal/notices/customer-agreement> [<https://perma.cc/6JRM-3UMF>] (referring to AAA Consumer Arbitration Rules).

63. See *Terms of Use*, WALGREENS BOOTS ALL., <https://www.walgreensbootsalliance.com/terms-use> [<https://perma.cc/E9GC-7F6X>] (referring to AAA’s Supplementary Procedures for Consumer-Related Disputes).

64. See *Walmart.com Terms of Use*, WALMART, https://help.walmart.com/app/answers/detail/a_id/8#19 [<https://perma.cc/T2KT-2QZR>] (referring to JAMS Arbitration Streamlined Rules & Procedures).

65. See *Comcast Agreement for Residential Services*, XFINITY, <https://www.xfinity.com/corporate/customers/policies/subscriberagreement> [<https://perma.cc/78SJ-4LMC>] (referring to AAA Consumer Arbitration Rules).

66. See WELLS FARGO, DEPOSIT ACCOUNT AGREEMENT 4 (2019), <https://www.wellsfargo.com/fetch-pdf?formNumber=CCB2018C&subProductCode=ANY> [<https://perma.cc/6W8T-7YCV>] (referring to AAA Consumer Arbitration Rules).

67. See, e.g., ADR SERVICES RULES, *supra* note 54, at R1 (“[T]he parties shall be deemed to have made these rules a part of their arbitration agreement whenever their arbitration contract provides for arbitration according to the ADR Services, Inc.”); ARC RULES, *supra* note 54, at R1 (“These rules shall apply whenever the parties have agreed to arbitrate in accordance with ARC Arbitration Rules and/or whenever the parties agree that ARC shall serve as the administrator of an arbitration.”).

68. See *supra* text accompanying notes 1–33.

only received passing attention from civil procedure⁶⁹ and arbitration specialists.⁷⁰

This Article explores this alternate procedural dimension. It begins by examining the forces that have made the Arbitration Rules so crucial. The story begins in the late 1920s, when the AAA began to offer “organized” arbitration, which was more structured than traditional arbitration.⁷¹ To facilitate this quasi-judicial form of dispute resolution, the AAA created a slate of Arbitration Rules, which functioned like a private code of civil procedure.⁷²

As the decades passed, new providers surfaced with their own brands of organized arbitration, which they expressed through unique

69. There is a rich body of literature on “contract procedure”: the practice of parties modifying the procedural rules that will govern any future dispute in the court system. *See, e.g.*, Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1331 (2012) (analyzing whether litigants should “be able to contract for a different pleading standard or summary judgment test, or even a particular jury composition or method of judicial decision”); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 515 (2011) (arguing that contract procedure “permits unelected and unaccountable contract drafters to reshape a function that reasonably is regarded as a core governmental function”); Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1127 (2011) (surveying “the extent to which the law constrains parties’ ability to contract freely for the procedures governing their dispute”); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 725 (2011) (discussing the pros and cons of “[c]ontracts modifying the spectrum of procedure, from commonplace jury-trial waivers to sophisticated alterations of evidentiary obligations and burdens of proof”); Jessica Erickson, *Bespoke Discovery*, 71 VAND. L. REV. 1873, 1876 (2018) (focusing on “ex ante agreements between two or more parties regarding how they will collect and exchange information in any future disputes between them”). However, these commentators have largely ignored the discrete phenomenon of procedural rulemaking by arbitration providers.

70. A few articles have analyzed particular providers’ rules, but they are both much more narrowly focused than this Article and decades out of date. *See generally* J. Noble Braden, *Sound Rules and Administration in Arbitration*, 83 U. PA. L. REV. 189 (1934) (assessing the AAA’s original Arbitration Rules); Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 369 (2004) (analyzing “due process protocols” that some providers have adopted for consumer and employment cases); Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 173, 215–21 (1998) (same); Jack M. Sabatino, *ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1314–37 (1998) (describing earlier versions of the Arbitration Rules of the AAA, CPR, and JAMS); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425 (1988) (focusing on the AAA’s Construction Rules).

71. FRANCES KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 22 (1948).

72. *See generally* AM. ARB. ASS’N, *CODE OF ARBITRATION: PRACTICE AND PROCEDURE OF THE AMERICAN ARBITRATION TRIBUNAL* 187–95 (1931) [hereinafter *CODE OF ARBITRATION*].

procedural principles. Then, starting in the late twentieth century, the Court expanded the FAA and drafters inserted forced arbitration provisions into millions of contracts, projecting the Arbitration Rules across vast swaths of the civil justice landscape.

Next, the Article critiques the Arbitration Rules by comparing them to the Federal Rules. It argues that these procedural kingdoms diverge in three main ways. First, most Federal Rules are drafted by experts who solicit input from the public and subject their proposals to legislative veto. The Arbitration Rules lack this pedigree. Although some are forged in a dialectic between providers, stakeholders, and courts, others are simply imposed by for-profit entities. Second, unlike the Federal Rules, which are trans-substantive and uniform, the Arbitration Rules are context-specific. Not only do providers' codes differ from each other, but the AAA, JAMS, the Forum, NAM, and USA&M have created unique rules for particular case types, such as commercial, consumer, employment, and franchise. Third, although the Federal Rules try to generate "correct" results at an acceptable pace and cost, the Arbitration Rules sacrifice precision at the altar of efficiency.

Of course, the fact that the Arbitration Rules deviate from the Federal Rules is not inherently troubling. After all, the point of *alternative* dispute resolution is that it is *not* litigation.⁷³ In fact, some of the Arbitration Rules' distinctive traits seem like upgrades. For example, the diversity of procedural options furthers autonomy by allowing parties to "designate their preferred arbitration provider and rule set from among a variety of market choices."⁷⁴ Likewise, tailoring Arbitration Rules to particular kinds of disputes allows providers like the AAA and JAMS to create progressive regimes—known as "Due Process Protocols" and "Minimum Standards"—that protect the rights of vulnerable parties.⁷⁵ Finally, thanks in part to the sleek contours of the Arbitration Rules, private dispute resolution has long been regarded as quicker than litigation.⁷⁶

However, procedural rulemaking by arbitration providers also has a dark side. For one, allowing profit-seeking providers to create their own procedural fiefdoms has predictable consequences. Over the years, some arbitration administrators have tilted the scales of

73. See H.R. REP. NO. 68-96, at 2 (1924) (explaining that Congress passed the FAA to help parties avoid the costs and delay of proceedings in court).

74. W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865, 1899 (2015).

75. See *infra* text accompanying notes 159–65.

76. See, e.g., *Bokunewicz v. Purolator Prod., Inc.*, 907 F.2d 1396, 1400 (3d Cir. 1990) (stating that arbitration is faster than litigation).

justice toward corporate defendants.⁷⁷ Likewise, because the Federal Rules govern all cases, they are simple and accessible. Yet the cacophony of competing Arbitration Rules—which vary by organization and claim type—exacerbate the information asymmetry between one-shot plaintiffs and repeat-playing corporations. Finally, drafters like Dr. Andresen’s employer have learned to game the system by selecting unsuitable procedural packages, such as requiring employees to arbitrate under the AAA’s Commercial Rules.⁷⁸

The Article then argues that courts should give these differences greater weight when they confront three problems that hinge on the Arbitration Rules. First, the Arbitration Rules permit arbitrators to decide “arbitrability”: the gateway issue of whether a plaintiff must arbitrate the merits of her claim. Thus, most courts have held that an arbitration clause that merely selects a provider’s code delegates arbitrability to the arbitrator. The Article argues that these decisions are wrong both doctrinally and as a matter of policy. Not only do they misinterpret the relevant Arbitration Rules, but they ignore the fact that judicial review is indispensable to arbitration’s legitimacy. Second, some corporations, like Dr. Andresen’s employer, have begun trying to stack the deck against plaintiffs by selecting codes that are meant for distinct matters. The Article urges judges to crack down on this exploitative tactic. Third, the Article examines the budding phenomenon of mass arbitrations. According to the conventional wisdom, because plaintiffs will not pursue their own small claims in arbitration, class arbitration waivers function as a “‘get out of jail free’ card” for corporate liability.⁷⁹ But as in the Doordash case mentioned above, plaintiffs’ lawyers have begun to file thousands of stand-alone arbitrations against a single defendant for the same alleged wrongdoing.⁸⁰ The Article explains how the Arbitration Rules both set this trend in motion and will control its future.

To be clear, the Article does not analyze the entire cosmos of procedural rules in arbitration. Instead, it excludes specialist arbitration administrators that handle specific claims (like those involving insurance)⁸¹ or particular industries (such as the New York Cotton

77. See *infra* text accompanying notes 223–27.

78. See *supra* text accompanying notes 20–28.

79. Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 868 (Ct. App. 2002).

80. See *supra* text accompanying notes 29–33.

81. See, e.g., ARB. FS., INC., ARBITRATION FORUMS, INC. RULES (2020), https://home.arbfile.org/ArbitrationForums/media/resources/downloads/Current_AF_Rules.pdf [<https://perma.cc/2SAC-BD7T>] (offering dispute resolution services for the insurance industry).

Exchange or the Financial Industry Regulatory Authority).⁸² Instead, it focuses on generalist providers such as the AAA and JAMS, which serve as true substitutes for the court system because their procedures cover “all kinds of disputes”⁸³ and “transcend[] . . . any given professional or trade association.”⁸⁴ In addition, the Article does not dwell on how private procedural rulemaking affects business-to-business or post-dispute arbitrations. Instead, it concentrates on forced arbitration, which is the white-hot center of current policy debates.

The Article contains three Parts. Part I explains how the AAA’s first set of Arbitration Rules blended arbitration’s informal conventions with orderly, court-like procedures. Part I then details how the advent of forced arbitration and the emergence of new providers brought untold numbers of disputes under the umbrella of the Arbitration Rules. Part II sharpens our understanding of private procedural rulemaking by contrasting the Arbitration Rules with the Federal Rules. Part III then uses the insights from Part II to examine the boundary between arbitral and judicial power, the opportunistic use of Arbitration Rules, and mass arbitrations.

I. THE HISTORY OF THE ARBITRATION RULES

This Part traces the evolution of the Arbitration Rules. It reveals how the AAA created the first private procedural code as part of its goal of bringing organized arbitration to the masses. It then explains how a variety of factors—including the emergence of new providers and the Court’s muscular interpretation of the FAA—made the Arbitration Rules a fixture in contemporary dispute resolution.

A. THE BIRTH OF THE ARBITRATION RULES

The early twentieth century was the apex of the procedural justice movement. In 1938, policymakers modernized litigation by enacting the Federal Rules.⁸⁵ Yet, as this Section explains, our understanding of this period omits a key piece. In 1927, the AAA created the first

82. See, e.g., Philip G. Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 626–27 (1934) (noting that certain industries have developed arbitration institutions with their own procedural norms); *Arbitration Rules*, FINRA (2020), <https://www.finra.org/arbitration-mediation/arbitration-rules> [<https://perma.cc/FL2T-7QTQ>] (governing arbitration of securities disputes).

83. KELLOR, *supra* note 71, at 63.

84. Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940, 2984 (2015).

85. *Federal Rules of Civil Procedure*, U.S. CTS. <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure> [<https://perma.cc/RXE3-BF2W>].

set of Arbitration Rules, which laid the groundwork for organized arbitration.⁸⁶

In the late 1800s and early 1900s, procedure in the United States was a sprawling mess. Federal practice was bifurcated. In equity, courts applied the Federal Equity Rules.⁸⁷ But when a matter was at law, the Conformity Act of 1872 instructed the judge to follow “the practice, pleadings, and forms and modes of proceeding” of the state in which it sat.⁸⁸ In turn, because the Conformity Act was riddled with exceptions, “one did not know what procedural law would apply: state, federal, or judge-made.”⁸⁹ Under this convoluted regime, “a lawyer practicing in the [f]ederal courts, even in his own state, fe[lt] no more certainty as to the proper procedure than if he were before a tribunal of a foreign country.”⁹⁰

In many states, the situation was just as dire. For example, in New York, procedural statutes had swollen to over a thousand provisions.⁹¹ Likewise, some jurisdictions still labored under highly technical common law procedural traditions. For instance, under the custom of single issue pleading, parties exchanged multiple filings—declarations, demurrers, traverses, confessions, and avoidances—to whittle the case down to a lone question of fact that was suitable for a jury to decide.⁹² Although this system brought a dispute to a head, it was so formalistic that “the whole fate of a law-suit depend[ed] upon the exact words that the parties utter[ed] when they [we]re before the tribunal.”⁹³

86. KELLOR, *supra* note 71, at 76.

87. See JAMES LOVE HOPKINS, *THE NEW FEDERAL EQUITY RULES*, at xi (3d ed. 1922) (explaining that the rules went into effect in 1822).

88. An Act to further the Administration of Justice, Pub. L. No. 42-255, § 5, 17 Stat. 196, 197 (1872).

89. Subrin, *supra* note 35, at 957–58.

90. J. Newton Fiero, *Report of Committee on Uniformity of Procedure and Comparative Law*, 19 A.B.A. ANN. REP. 411, 420 (1896); Charles Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 546, 564 (1930) (recognizing that the Conformity Act of 1872 has “resulted in considerable confusion in Federal practice, owing to the exceptions and limitations, which decisions of the Supreme Court have read into the Act”).

91. See Subrin, *supra* note 35, at 940.

92. See HENRY JOHN STEPHEN, *PRINCIPLES OF PLEADING IN CIVIL ACTIONS* 264 (2d ed. 1901); Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 526 (1925) (“[E]ach party must in turn answer the previous pleading of his adversary by either denying, or affirming and adding new matter (*confessing and avoiding*) until there is ultimately reached a stage where one side has affirmed and the other has denied a single material point in the case.”).

93. SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 190 (1895).

As is well-known, the Federal Rules, which became effective in 1938, helped clear this thicket.⁹⁴ Unlike the chaotic regime they replaced, the Federal Rules were trans-substantive and uniform.⁹⁵ They governed all cases in federal courts without regard to the causes of action or the amount at issue.⁹⁶ In addition, whereas procedural arcana was once the order of the day, the new national regime was a triumph of minimalism. The Federal Rules abolished single issue pleading, authorized expansive discovery, and permitted easy joinder of parties.⁹⁷ Finally, the Federal Rules went out of their way to give courts discretion.⁹⁸ Borrowing heavily from equity practice, they armed judges with the power “to do what was right.”⁹⁹

However, the Federal Rules were not Congress’s first attempt at procedural reform in the early twentieth century. In 1925, Congress had taken a step toward addressing the widespread dissatisfaction with the judicial system by passing the Federal Arbitration Act (FAA).¹⁰⁰ Arbitration was not new: members of chambers of commerce and trade associations had long avoided the swamp of the judicial system by submitting disputes to prominent businesspeople, who resolved them by applying customs, rather than legal rules.¹⁰¹ But outside of these insular communities, the common law stunted arbitration’s growth. Under the ancient ouster and revocability doctrines,

94. 48 Stat. 1064 (1934); 28 U.S.C. § 723.

95. See David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 394–99 (2010) (explaining why reformers were drawn to the principle of trans-substantivity).

96. See *id.* at 376–77 (explaining that most of the Federal Rules are trans-substantive).

97. See Subrin, *supra* note 35, at 922–24.

98. See *id.* at 944 (claiming that “judges were to have discretion to do what was right”).

99. *Id.*

100. See 9 U.S.C. §§ 1–15. Today, “many plaintiffs seem to regard arbitration as the place where ‘lawsuits go to die.’” *Hawkins v. Region’s*, 944 F. Supp. 2d 528, 532 (N.D. Miss. 2013). Yet scholars have recently demonstrated that the FAA stemmed from a desire to sweep away the cobwebs of ancient procedural law and facilitate access to justice. See IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 183–84* (2013) (explaining that the enactment of the FAA was to minimize the delay in attending trials); Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1943–53 (2014) (stating that the FAA was designed to promote access to the judicial system).

101. See KELLOR, *supra* note 71, at 4 (noting that arbitration occurred in chambers of commerce along the eastern seaboard as early as the late eighteenth century); Phillips, *supra* note 82, at 590 (noting that for many years “guilds required their members to submit disputes to the guild tribunals before they could go to court”).

judges refused to uphold pre-dispute contracts to arbitrate.¹⁰² The FAA abolished these anti-arbitration rules through its centerpiece, section 2, which makes arbitration clauses specifically enforceable, subject to generally-applicable contract principles, such as fraud or duress.¹⁰³ By doing so, Congress sought to encourage access to “an alternative forum” that was characterized by “simplicity, flexibility, and intolerance of technicalities.”¹⁰⁴

Although the FAA overruled centuries of law, it was relatively threadbare. The statute governed the periods before and after the arbitration. For example, sections 3 and 4 entrusted courts with deciding arbitrability: the threshold issue of whether a dispute fell within the scope of a valid arbitration agreement.¹⁰⁵ Likewise, section 10 permitted courts to overturn awards for egregious errors, such as when an arbitrator “exceeded [his or her] powers” or displayed “evident partiality.”¹⁰⁶ Yet the FAA did not address the nuts and bolts of the arbitral process itself.¹⁰⁷

This was not surprising, because complex procedural rules in arbitration would have been jarring. Traditionally, private dispute resolution was casual and improvisational: parties “appoint[ed] arbitrators and le[ft] them to blunder along ... without procedural guidance.”¹⁰⁸ To be sure, some trade associations and merchant groups created charters and bylaws to govern their conflict resolution regimes.¹⁰⁹ Nevertheless, these were mere sketches of procedural rules. For example, the New York Chamber of Commerce’s arbitration

102. See *Kill v. Hollister* (1746) 95 Eng. Rep. 532 (KB) (“[T]he agreement of the parties cannot oust this [c]ourt.”); *Vynior’s Case*, (1609) 77 Eng. Rep. 597, 599 (KB) (explaining that arbitration agreements were “of [their] own nature countermandable”).

103. See 9 U.S.C. § 2 (making arbitration clauses in contracts that affect interstate commerce “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”); H.R. REP. NO. 68-96, at 1 (1924) (noting that the FAA tried to abolish ancient judicial hostility to arbitration).

104. Aragaki, *supra* note 100, at 1943.

105. 9 U.S.C. §§ 3–4.

106. *Id.* § 10(a)(2), (4).

107. See Braden, *supra* note 70, at 190 (noting that the FAA was “enabling and not regulatory legislation”). There are two quasi-exceptions: section 5 of the statute governs some issues related to the appointment of the arbitrator, and section 7 allows arbitrators to compel witnesses to attend hearings and to produce documents. 9 U.S.C. §§ 5, 7.

108. KELLOR, *supra* note 71, at 24; Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 857 (1961) (explaining that, in trade associations, “the norms and standards of the group itself are being brought to bear by the arbitrators”).

109. Heinrich Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L.J. 36, 42 n.24 (1944).

code spanned a grand total of three pages and included vacuous statements like “cases . . . shall be pressed to speedy termination” and “[a]ll irrelevant or unimportant matters shall be excluded.”¹¹⁰ Thus, the norm was that “in arbitration proceedings[,] ‘anything goes.’”¹¹¹

But in 1927, the AAA—a non-profit entity that administered arbitrations—unveiled a fundamentally different blueprint.¹¹² The AAA sought to create a system of “organized arbitration” in which disputes marched methodically “under uniform rules of procedure.”¹¹³ To that end, the institution created seventeen Arbitration Rules that followed “the basic structure of an adversarial trial.”¹¹⁴ They allowed parties to file pleadings¹¹⁵ and briefs,¹¹⁶ to obtain transcriptions of hearings,¹¹⁷ and to request a written award.¹¹⁸

Three aspects of the original Arbitration Rules are especially relevant for my purposes. First, the AAA imposed discipline on its dispute resolution machinery to try to insulate arbitration from judicial review. As Frances Kellor, a founder and vice president of the AAA, observed, “[t]he old practice of avoiding rules of procedure [had] result[ed] in loopholes through which the courts could upset awards.”¹¹⁹ Thus, by promulgating Arbitration Rules, the AAA “avoid[ed] duplication, conflict, or confusion as to what each participant should do in processing a case” and maximized the odds that “both the arbitration agreement and the award” would be “found to be legally valid and enforceable.”¹²⁰ This strategy proved successful. In 1931, the

110. RULES AND REGULATIONS OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK III, IV, *reprinted in* JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 288–90 (1918).

111. *Kallus v. Ideal Novelty & Toy Co.*, 45 N.Y.S.2d 554, 555 (Sup. Ct. 1943).

112. Two professors, Philip G. Phillips and Walter J. Derenberg, apparently helped write the Rules. *See KELLOR, supra* note 71, at 76 n.1. Although the AAA adopted the Rules in 1927, *see id.*, the Rules became more prominent in 1931, when the institution published them at the end of a popular treatise. *CODE OF ARBITRATION, supra* note 72, at 187–95.

113. *KELLOR, supra* note 71, at 22–23.

114. *Kessler, supra* note 84, at 2987.

115. *CODE OF ARBITRATION, supra* note 72, at 188.

116. *Id.* at 192.

117. *See id.* at 190 (describing how the clerk shall make arrangements to record the testimony).

118. *Id.* at 193.

119. *KELLOR, supra* note 71, at 24.

120. *Id.* at 64–65.

organization boasted that courts had upheld more than 99% of awards generated under its code.¹²¹

Second, the AAA took a key step to propagate its singular vision of arbitration. AAA Rule XVI declared that parties who chose the institution to administer a case “shall be deemed to have made these Rules a part of the arbitration agreement.”¹²² Thus, anyone who signed a contract that mandated arbitration in the AAA incorporated the Arbitration Rules by reference and became bound by them.¹²³ To be sure, nothing prevented parties from drafting around the Arbitration Rules. But because this required spending extra time and money, the Arbitration Rules proved to be “sticky,” and they governed nearly every dispute on the AAA’s docket.¹²⁴

Third, even though the Arbitration Rules made arbitration more akin to litigation, they were also more progressive than court procedures at that time. In fact, in several ways, the AAA anticipated the sea change of the Federal Rules, which did not appear for another eleven years. For one, the Arbitration Rules were trans-substantive and uniform. Indeed, as the AAA boasted, its code “may be used in any type of controversy” and is “adaptable to any jurisdiction in the United States.”¹²⁵ Likewise, the Arbitration Rules abandoned the common law’s onerous tradition of single-issue pleading. Years before Federal Rule 8 relaxed pleading standards,¹²⁶ AAA Rule II merely required the claimant to file “a brief statement of the controversy” and the respondent to lodge “a brief answer.”¹²⁷ And lastly, like the Federal Rules, the Arbitration Rules gave the decision-maker wide leeway to define the parameters of the hearing.¹²⁸

121. *Id.* at 65 n.1; see Kessler, *supra* note 84, at 2990 (relating the original Arbitration Rules to a broader movement in which “the legal elites responsible for running the AAA” gave themselves “substantial, discretionary power to craft the pre-constituted package of procedures [that] they deemed best”).

122. CODE OF ARBITRATION, *supra* note 72, at 195.

123. *Samson v. Bergin*, 17 Conn. Supp. 127, 127 (C.P. 1950).

124. *Cf. KELLOR*, *supra* note 71, at 64–65 (“Whatever may be lost in freedom of action is more than compensated for by the assurance that both the arbitration agreement and the award, when processed under Rules, are generally found to be legally valid and enforceable.”).

125. CODE OF ARBITRATION, *supra* note 72, at 1.

126. FED. R. CIV. P. 8(a)(2) (requiring that “[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief”).

127. CODE OF ARBITRATION, *supra* note 72, at 188.

128. *See id.* at 190–92 (empowering the arbitrator to set the location and time of the hearing, control who attended, and decide what weight to afford evidence).

In sum, the AAA's initial Arbitration Rules made organized arbitration a viable alternative to the court system. As the Article discusses next, this model would soon dominate a booming industry.

B. THE EVOLUTION OF THE ARBITRATION RULES

In the second half of the twentieth century, arbitration changed dramatically. The Court expanded the FAA, forced arbitration provisions became common, and new providers challenged the AAA for market share. This section explains how these developments caused the Arbitration Rules to supplant state-supplied procedures on a massive scale.

Soon after the Federal Rules appeared, the AAA revised its Arbitration Rules. To distinguish itself from the newly-streamlined procedures available in court, the institution abandoned its one-size-fits-all aspiration and adopted specialized principles for commercial, tort, and labor disputes.¹²⁹ Although the differences between these Rules were minor,¹³⁰ they highlighted one of arbitration's advantages: in court, procedure was relatively static, but in arbitration, it was elastic.

In addition, the AAA elaborated upon its original code, increasing the number of Arbitration Rules to fifty-two by the 1940s.¹³¹ Despite these embellishments, the core goal remained the same: to generate awards that withstood judicial review. For example, to dispel any confusion about the vast breadth of arbitrators' powers, Rules 24 and 25 of the AAA's Accident Claims Tribunal permitted arbitrators to ignore the "legal rules of evidence" and make up their own minds concerning "the relevancy and materiality" of any offer of proof.¹³² Likewise, AAA Commercial Rule 42 authorized arbitrators to confer any "relief which [they] deem[] just and equitable and within the scope of the

129. See *Merger Fabrics, Inc. v. Coill-Shuman Co.*, 74 N.Y.S.2d 76, 77 (Sup. Ct. 1947) (referring to the AAA's Commercial Rules); *Frantz v. Inter-Ins. Exch. of the Auto. Club of S. Cal.*, 40 Cal. Rptr. 218, 222 (Ct. App. 1964) (mentioning the AAA's Accident Claims Tribunal Rules); *Cemetery Stone Handlers, Erectors & Granite Yard Helpers, Loc. No. 106 v. Palumbo*, 130 N.Y.S.2d 373, 375 (Sup. Ct. 1954) (featuring a contract that incorporated the AAA's Labor Rules).

130. See KELLOR, *supra* note 71, at 219–30 (listing the Commercial Rules and using footnotes to point out the few places where the Labor Rules diverged); Geo. Savage King, *Arbitration of Automobile Accident Claims*, 14 U. FLA. L. REV. 328, 345 (1962) (noting that the AAA's tort rules made "little change" to the commercial rules).

131. See KELLOR, *supra* note 71, at 219–30.

132. *Atlas Floor Covering v. Crescent House & Garden, Inc.*, 333 P.2d 194, 199 (Ct. App. 1958); *Milliken Woolens, Inc. v. Weber Knit Sportswear, Inc.*, 192 N.Y.S.2d 408, 411–12 (Sup. Ct. 1959), *rev'd*, 202 N.Y.S.2d 431 (App. Div. 1960), *aff'd*, 175 N.E.2d 826 (N.Y. 1961).

agreement of the parties.”¹³³ This meant that arbitrators could properly bestow remedies that courts “would not grant.”¹³⁴

As the decades marched on, arbitration became firmly rooted in the legal system, and new providers emerged with their own spins on organized arbitration. For instance, in 1979, a consortium of corporations and law firms founded the Center for Public Resources (CPR) Institute for Dispute Resolution.¹³⁵ CPR was geared for cross-border disputes between big businesses, and thus featured three-arbitrator panels, evidentiary privileges, and reasoned awards.¹³⁶ A year later, former trial judge H. Warren Knight founded Judicial Arbitration & Mediation Services (JAMS).¹³⁷ Unlike the AAA and CPR, which were non-profit, JAMS operated “like a for-profit law firm,” with its arbitrators, like partners, holding equity stakes in the company.¹³⁸ JAMS was to domestic arbitration what CPR was to international arbitration: it held itself out as the destination of choice for complex, high-stakes matters. JAMS’ default code, the Comprehensive Rules, contained procedures that emulated the Federal Rules, including “extensive . . . discovery[]” and summary judgment motions that were to be decided under the “same burdens as a court in the jurisdiction would apply under similar circumstances.”¹³⁹ Thus, if the AAA offered “litigation lite,”¹⁴⁰ JAMS came close to selling private litigation.

133. *Saucy Susan Prods., Inc. v. Allied Old Eng., Inc.*, 200 F. Supp. 724, 729 n.9 (S.D.N.Y. 1961); *Sapp v. Barenfeld*, 212 P.2d 233, 239 (Cal. 1949) (noting that incorporating the AAA’s Rules permitted the arbitrators to “base their decision upon broad principles of justice and equity, and . . . expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action”).

134. *Staklinski v. Pyramid Elec. Co.*, 172 N.Y.S.2d 224, 227 (Sup. Ct. 1958), *aff’d*, 180 N.Y.S.2d 20 (App. Div. 1958), *aff’d*, 160 N.E.2d 78 (N.Y. 1959). Likewise, to limit the paper trail available to parties seeking to vacate awards in court, the AAA “put[] enormous pressure on its arbitrators not to write opinions but to merely state the award in dollar amounts.” *Mentschikoff*, *supra* note 108, at 857.

135. *Sabatino*, *supra* note 70, at 1301–02.

136. See Tom Arnold & Dan Hubert, *Spreadsheet Comparison of Various Arbitration Rules*, A.L.I.-A.B.A. COURSE STUDY, ARB., MEDIATION, & OTHER ADR METHODS, NOV. 18, 1993, at 287, 289 (1993).

137. *E.g.*, Anne S. Kim, *Rent-a-Judges and the Cost of Selling Justice*, 44 DUKE L.J. 166, 173–74 (1994).

138. Reply Brief of Appellant at *8 n.10, *City Beverages, L.L.C. v. Monster Energy Co.*, No. 17-55813, 2018 WL 4222941 (9th Cir. Aug. 27, 2018); *Stewart & Assocs. Int’l, Inc. v. Quixtar Inc.*, No. 05-3440-CV-S-RED, 2006 WL 8438384, at *4 (W.D. Mo. Nov. 20, 2006) (“JAMS is a private, for-profit corporation in which all of its neutrals are also shareholders in the corporation.”).

139. *Sabatino*, *supra* note 70, at 1315, 1324.

140. *Id.*

Then, in the 1980s, the U.S. Supreme Court issued a flurry of opinions that transformed arbitration “from the role of commercial court to that of a civil court of general jurisdiction.”¹⁴¹ For starters, although Congress intended the FAA primarily to govern fact-bound breach-of-contract allegations,¹⁴² the Justices sent complex antitrust and employment discrimination claims into the private forum.¹⁴³ The Court justified this result by opining that the shift between litigation and arbitration did not affect the ultimate outcome of a case:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.¹⁴⁴

Similarly, in *Southland Corp. v. Keating*, the Court held that section 2 of the FAA—which, as noted, makes arbitration agreements specifically enforceable¹⁴⁵—applies in state court and preempts state law.¹⁴⁶ After *Southland*, state legislatures and courts applying contract rules could neither “prohibit[] outright the arbitration of a particular type of claim” nor “promot[e] procedures incompatible with arbitration.”¹⁴⁷ Banks, credit card issuers, employers, hospitals, and schools added arbitration clauses to their fine print.¹⁴⁸

The Court’s FAA jurisprudence sparked heated debate. Businesses and their allies defended forced arbitration as fast and inexpensive.¹⁴⁹ However, other scholars, plaintiffs’ attorneys, and public

141. Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 8 (1998).

142. See Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926) (calling arbitration “peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact”).

143. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (compelling arbitration of Sherman Act claim); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26–27 (1991) (ordering arbitration of alleged violations of the Age Discrimination in Employment Act).

144. *Mitsubishi*, 473 U.S. at 628.

145. See *supra* text accompanying note 103.

146. 465 U.S. 1, 16 (1984) (finding that the FAA prohibited state law from “undercut[ting] the enforceability of [an] arbitration agreement”).

147. *Prima Donna Dev. Corp. v. Wells Fargo Bank, N.A.*, 255 Cal. Rptr. 3d 174, 187 (Ct. App. 2019) (internal quotations marks omitted) (citing *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 341 (2011)); *Iskanian v. CLS Transp. L.A., L.L.C.*, 173 Cal. Rptr. 3d 289, 327 (2014).

148. Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 5 (1997).

149. See, e.g., David Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water*,

interest organizations objected that arbitration “strip[s] people of their rights”¹⁵⁰ and “systematically reduces the legal liability of corporate defendants.”¹⁵¹ Some courts shared these concerns, and invoked the unconscionability doctrine to strike down arbitration agreements that slashed discovery,¹⁵² shifted costs to the plaintiff,¹⁵³ barred the award of certain remedies,¹⁵⁴ and chose inconvenient locations for the hearing.¹⁵⁵

This controversy left a deep imprint on the Arbitration Rules. In the late 1990s, an independent Task Force on Alternative Dispute Resolution identified a series of procedural safeguards that were necessary to “provid[e] due process” in mandatory employment arbitration, including the rights to adequate discovery and an impartial decision-maker.¹⁵⁶ Providers displayed little interest in these recommendations.¹⁵⁷ But then the powerful National Employment Lawyers Association threatened to boycott the AAA and JAMS.¹⁵⁸ As an olive branch, both institutions adopted the Task Force’s proposals in the form of “Due Process Protocol” (in the AAA)¹⁵⁹ and “Minimum Standards” (in

and *Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 105 (1999) (“[A]rbitration provide[s] the parties with an inexpensive, confidential, and fast resolution.”).

150. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401; Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 782–83 (2002) (“[W]hatever the rules of law may be, arbitrators are not bound to follow them, and their handiwork is subject to only the most perfunctory of judicial oversight.”).

151. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 37.

152. *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 786 (9th Cir. 2002).

153. *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267, 277 (Ct. App. 2003).

154. *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 671 (S.C. 2007).

155. *Nagampa v. MailCoups, Inc.*, 469 F.3d 1257, 1285–86 (9th Cir. 2006).

156. AM. ARB. ASS’N, EMPLOYMENT DUE PROCESS PROTOCOL 1 (1995), https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf [<https://perma.cc/GCZ4-8FJ5>] (offering suggestions for forced employment arbitration); JOHN T. DUNLOP & ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* 149–67 (1997) (providing further suggestions for forced employment arbitration).

157. See Richard C. Reuben, *Mandatory Arbitration Clauses Under Fire*, A.B.A. J., Aug. 1996, at 58, 58–59 (explaining how this prompted a number of organizations to agree on “due process protocols”).

158. *Id.*

159. AM. ARB. ASS’N, CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES 1 (1998), [https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20\(1\).pdf](https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf) [<https://perma.cc/RV3Z-3Z8X>]; AM. ARB. ASS’N, EMPLOYMENT DUE PROCESS PROTOCOL (1995), <https://www.adr.org/sites/>

JAMS).¹⁶⁰ Both organizations announced that they would refuse to administer forced arbitrations unless the underlying arbitration provision complied with these norms.¹⁶¹ In addition, they wove these principles into special Arbitration Rules.¹⁶² Among other things, these progressive procedural codes open the courthouse door—or, more accurately, the conference room door—by requiring businesses to subsidize plaintiffs' claims. In consumer cases, the AAA's filing and administrative costs range up to \$2,200, but individuals only pay \$200 of this sum.¹⁶³ Likewise, although JAMS' Comprehensive Rules prescribe a \$1,750 filing fee in two-party matters,¹⁶⁴ its Employment Rules shift this expense to firms that mandate arbitration "as a

default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf [https://perma.cc/GCZ4-8FJ5].

160. JAMS, CONSUMER ARBITRATION MINIMUM STANDARDS (2009), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Std-2009.pdf [https://perma.cc/ED9X-4BZE]; JAMS, POLICY ON EMPLOYMENT ARBITRATION MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (2009), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Employment_Min_Std-2009.pdf [https://perma.cc/BN87-YJX6].

161. See, e.g., *Employment Arbitration under AAA Administration*, AM. ARB. ASS'N, <https://www.adr.org/employment> [https://perma.cc/KD5B-JBRF] ("The AAA will accept a case for administration only after the AAA reviews the parties' arbitration agreement and if the AAA determines that the agreement substantially and materially complies with the due process standards of the Rules and the Employment Due Process Protocol."). In addition, the AAA's efforts to create a Due Process Protocol for healthcare arbitrations led to the institution refusing to handle such cases when they stem from a pre-dispute arbitration clause. AM. ARB. ASS'N, AAA HEALTHCARE POLICY STATEMENT (2003), https://www.adr.org/sites/default/files/document_repository/AAA_Healthcare_Policy_Statement_0.pdf [https://perma.cc/QX6P-FUUU]. For more on the Protocols, including empirical evidence that the AAA honors its commitment to reject cases that do not comply with its standards, see Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 301–52 (2012).

162. See AM. ARB. ASS'N, CONSUMER ARBITRATION RULES (2014) [hereinafter AAA CONSUMER RULES], <https://www.adr.org/sites/default/files/Consumer%20Rules.pdf> [https://perma.cc/6XV8-QAW8]; AM. ARB. ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES (2007) [hereinafter AAA EMPLOYMENT RULES], https://www.adr.org/sites/default/files/employment_arbitration_rules_and_mediation_procedures_0.pdf [https://perma.cc/3WX9-HL9C]; *Streamlined Arbitration Rules & Procedures*, JAMS (2014) [hereinafter *JAMS Streamlined Rules*], <https://www.jamsadr.com/rules-streamlined-arbitration> [https://perma.cc/WG2M-84UE]; *Employment Arbitration Rules & Procedures*, JAMS (2014) [hereinafter *JAMS Employment Rules*], <https://www.jamsadr.com/rules-employment-arbitration/english#fifteen> [https://perma.cc/6BK4-F7PB].

163. AAA CONSUMER RULES, *supra* note 162, at 33.

164. JAMS COMPREHENSIVE RULES, *supra* note 54, at 17; *Arbitration Schedule of Fees and Costs*, JAMS (2020), <https://www.jamsadr.com/arbitration-fees> [https://perma.cc/VPX2-KTT9].

condition of employment.”¹⁶⁵ Eventually, other providers, such as CPR and NAM, adopted their own versions of these principles.¹⁶⁶

Providers soon found that self-regulation had a silver lining. Recall that since the early days of the AAA, administrators have touted their services as a way to minimize the danger of courts invalidating arbitration agreements and awards.¹⁶⁷

Judges gave the AAA and JAMS new ammunition for this claim by treating the Due Process Protocols and Minimum Standards as benchmarks, citing compliance with them “as evidence that [a procedure] is fair and enforceable.”¹⁶⁸ Perhaps for this reason, the AAA began to market its Rules as “court- and time-tested.”¹⁶⁹

Recently, though, two issues have raised fresh uncertainty about the fairness of forced arbitration. First, the Court has amplified arbitral jurisdiction at the expense of judges. As noted above, sections 3 and 4 of the FAA entrust courts with deciding “arbitrability”: threshold questions about whether arbitration should proceed, such as whether an arbitration clause is valid or broad enough to cover a particular cause of action.¹⁷⁰ Yet in *First Options v. Kaplan*, the Court opined that parties can reverse this default rule and assign arbitrability to the arbitrator if “there is ‘clea[r] and unmistakabl[e]’ evidence” that they intended to do so.¹⁷¹ To eliminate judicial review of their contracts, firms began to give arbitrators the “exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this [arbitration clause].”¹⁷² In a 2010

165. JAMS EMPLOYMENT RULES, *supra* note 162, at r. 31(c).

166. *Employment Dispute Arbitration Procedure*, INT’L INST. FOR CONFLICT PREVENTION & RESOL. (2020), <https://www.cpradr.org/resource-center/rules/arbitration/employment-arbitration-procedure> [<https://perma.cc/4AQP-LLZG>]; NAT’L ARB. & MEDIATION, NAM’S MINIMUM STANDARDS OF PROCEDURAL FAIRNESS FOR CONSUMER ARBITRATIONS (2009), <https://www.namadr.com/wp-content/uploads/2016/07/Consumer-MinimumStandards.pdf> [<https://perma.cc/74JK-2F5H>].

167. See *supra* text accompanying notes 119–21.

168. Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165, 179–80 (2005); see also *Shoals v. Owens & Minor Distrib., Inc.*, No. 2:18-CV-2355, 2018 WL 5761764, at *6 (E.D. Cal. Oct. 31, 2018) (“Most courts have found that the JAMS rules provide for adequate discovery.”).

169. *What We Do*, *supra* note 46.

170. See *supra* text accompanying note 105; *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986) (“[T]he question of arbitrability . . . is undeniably an issue for judicial determination . . .”).

171. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (quoting *AT&T Techs., Inc.*, 475 U.S. at 649).

172. *Anderson v. Pitney Bowes, Inc.*, No. C 04-4808 SBA, 2005 WL 1048700, at *1 (N.D. Cal. May 4, 2005).

decision called *Rent-A-Center, West, Inc. v. Jackson*, the Court held that these so-called “delegation clauses” even permit the arbitrator to decide whether an arbitration agreement is unconscionable.¹⁷³

Second, the Court encouraged companies to use arbitration clauses to deter class actions. About two decades ago, corporations began experimenting with class arbitration waivers, which mandate that plaintiffs arbitrate on an individual basis.¹⁷⁴ Yet a chorus of courts held that these provisions were unconscionable when applied to plaintiffs who alleged that a business had deprived them of a small amount of money.¹⁷⁵ These judges reasoned that because no consumer or employee would incur the time, energy, and money to pursue low-dollar complaints, class arbitration waivers function as exculpatory clauses.¹⁷⁶ Nevertheless, in 2011’s *AT&T Mobility LLC v. Concepcion*, the Justices held that the FAA forbids courts from finding class arbitration waivers to be unconscionable.¹⁷⁷ The Court opined that Congress passed the statute “to facilitate streamlined proceedings”¹⁷⁸ and that class arbitration is too slow and procedurally formal to be compatible with this goal.¹⁷⁹ Gradually, the Justices built on *Concepcion*’s foundation,¹⁸⁰ eventually concluding in 2019’s *Lamps Plus v.*

173. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010).

174. See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 5–6 (2000).

175. See, e.g., *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (applying Georgia law); *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266, 1285–90 (D. Ariz. 2007); *Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1110 (Cal. 2005); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 274–75 (Ill. 2006); *Brewer v. Mo. Title Loans, Inc.*, 323 S.W.3d 18, 22–23 (Mo. 2010) (en banc); *Fiser v. Dell Comput. Corp.*, 188 P.3d 1215, 1221 (N.M. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006–08 (Wash. 2007) (en banc).

176. *Discover Bank*, 113 P.3d at 1108.

177. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

178. *Id.* at 344.

179. See *id.* at 347–49.

180. See *Am. Express Co. v. Italian Colors Rests.*, 570 U.S. 228, 235–38 (2013) (extending *Concepcion*, which involved state unconscionability principles, to a similar federal common law doctrine known as the “effective vindication” rule); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (overruling the National Labor Relations Board’s determination that class arbitration waivers in employment contracts violate the National Labor Relations Act).

Varela that the mere existence of an arbitration clause is a class action ban.¹⁸¹

The Court's decades of infatuation with the FAA have made the Arbitration Rules more important than ever. Not surprisingly, studies have found forced arbitration clauses in hundreds of millions of consumer and employment contracts.¹⁸² More for-profit providers have opened their doors, including ADR Services, Inc., ARC, NAM, JW, and USA&M.¹⁸³ Each of these companies have created signature Arbitration Rules for the thousands of organized arbitrations they handle each year.¹⁸⁴ The next Part takes a closer look at these private procedural codes.

II. CRITIQUING THE ARBITRATION RULES

Courts and commentators often describe arbitration as sacrificing the regimented procedures of the judicial system for a forum that is "simpl[e], informal[], and expedi[ent]."¹⁸⁵ But there is a more concrete way to understand this tradeoff. Because of the prominence of organized arbitration, being compelled to arbitrate usually means transitioning from one set of fixed procedures to another. This Part helps us understand what parties gain and lose from private dispute resolution by contrasting the Federal Rules and the Arbitration Rules.

A. PROCEDURES FOR CREATING PROCEDURE

The differences between the Federal Rules and the Arbitration Rules start with how they are created. The dominant method of promulgating the Federal Rules—court rulemaking—invites public input and is subject to congressional oversight.¹⁸⁶ As this section explains,

181. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019) (precluding courts from interpreting arbitration clauses that do not mention class actions as authorizing such proceedings).

182. See, e.g., CONSUMER FIN. PROT. BUREAU, CONSUMER FINANCIAL PROTECTION BUREAU STUDY FINDS THAT ARBITRATION AGREEMENTS LIMIT RELIEF FOR CONSUMERS (2015), https://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf [<https://perma.cc/7J8P-XYM8>]; Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers> [<https://perma.cc/V6Z6-MY6T>].

183. See *supra* text accompanying notes 45–53.

184. See *supra* text accompanying note 54.

185. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

186. See 28 U.S.C. §§ 2071(a), 2074(a).

most Arbitration Rules stem from processes that are neither inclusive nor susceptible to meaningful state control.

The overwhelming majority of the Federal Rules arise from court rulemaking.¹⁸⁷ Rather than drafting procedures itself, Congress has delegated the task to the Supreme Court under the Rules Enabling Act.¹⁸⁸ The Court gives the Advisory Committee on Civil Rules—an elite group of judges, lawyers, and law professors—the first crack at crafting the Federal Rules.¹⁸⁹ The Reporter of the Advisory Committee prepares drafts of new rules or amendments and “Committee Notes” explaining their purpose or intent.¹⁹⁰ If the Advisory Committee approves of a proposal, it goes up the ladder to three more groups of experts, the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, and, finally, the Court.¹⁹¹ If the Justices approve of the suggested Federal Rules, they become law unless Congress vetoes them within seven months.¹⁹²

Court rulemaking is no stranger to controversy. In the late 1970s, a parade of commentators argued that the process needed to be more open:

[The] rules [are] drafted by a committee of private citizens and judges acting in an advisory capacity, which operates for the most part in private; approved by a body of judges, meeting entirely in private; promulgated by the Supreme Court without any real expectation, or the procedure to warrant that expectation, of focused consideration of constitutional or statutory questions; and “approved” by the legislature through simple inaction . . .¹⁹³

To assuage these concerns, Congress overhauled court rulemaking in 1988.¹⁹⁴ It adopted a notice-and-comment rubric like the one employed by federal agencies, ensuring “broad public participation by requiring public hearings, open meetings, publicly available minutes,

187. Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 328–31 (1991).

188. See 28 U.S.C. § 2071(a).

189. See *How the Rulemaking Process Works*, U.S. CTS. [hereinafter *Rulemaking Process*], <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> [<https://perma.cc/GB3T-87Z9>]; *Committee Membership Selection*, U.S. CTS., <https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection> [<https://perma.cc/CE54-7HTA>].

190. Baker, *supra* note 187, at 329.

191. See *Rulemaking Process*, *supra* note 189.

192. See 28 U.S.C. § 2074(a).

193. Howard Lesnick, *The Federal Rule-Making Process: Time for Re-examination*, 61 A.B.A. J. 579, 582 (1975); see also Jack B. Weinstein, *Reform of Federal Court Rule-making Procedures*, 76 COLUM. L. REV. 905, 907–08 (1976) (noting ways in which court rulemaking seems more legislative than judicial).

194. See Judicial Improvements and Access to Justice Act § 401(c), 28 U.S.C. § 2073(c).

and longer periods for public commentary.”¹⁹⁵ For example, before the Advisory Committee amended the discovery rules in 2015, it heard testimony from 120 witnesses and received 2,300 written comments.¹⁹⁶ This new model is largely “seen as more democratic and more accountable than the work of cloistered experts.”¹⁹⁷ But it also has a downside. Interest groups have seized the chance to make their voices heard and swamped the Committees with opinions.¹⁹⁸ As a result, “[e]ven ordinary rule changes typically t[a]k[e] three years or more.”¹⁹⁹

The process of creating the Arbitration Rules is nothing like court rulemaking. For one, providers do not even disclose how they decide to change their codes or what they do to vet these revisions. Thus, the manner of making the Arbitration Rules is as much of a black box as arbitration itself. In fact, it is often hard to tell whether an organization *has* amended its code. Although the AAA and ADR Services collect archived versions of older Rules²⁰⁰—and JAMS goes further by releasing a memorandum explaining recent amendments²⁰¹—other providers simply post the latest version of their procedures on their websites.²⁰² These Arbitration Rules materialize with no explanation or fanfare.

Also, unlike the Advisory Committee, providers establish procedures by fiat. They neither publish their proposals, solicit input, hold hearings, nor submit to regulatory review. To be sure, there are exceptions: the AAA’s and JAMS’s Rules for forced arbitrations originated with a task force that included members from groups like the American Civil Liberties Union, the American Bar Association, and the

195. Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 903 (1999).

196. John J. Jablonski & Alexander R. Dahl, *The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation*, 82 DEF. COUNS. J. 411, 412 (2015).

197. Jordan M. Singer, *The Federal Courts’ Rulemaking Buffer*, 60 WM. & MARY L. REV. 2239, 2294 (2019).

198. *See id.* at 2299–3000.

199. *Id.* at 2298.

200. *See Rules, Forms, Fees*, AM. ARB. ASS’N, <https://www.adr.org/ArchiveRules> [<https://perma.cc/E573-RVXK>]; *Arbitration Rules*, ADR SERVS., INC., <https://www.adrservices.com/services/arbitration-rules> [<https://perma.cc/DAD9-2QXG>].

201. *See Summary of Revisions to Employment Arbitration Rules*, JAMS, <http://jamsadr.com/files/Uploads/Documents/JAMS-Rules/2014-Summary-of-Employment-Rules-Changes.pdf> [<https://perma.cc/BE7S-GB5M>].

202. *See, e.g., Rules, Fees and Forms*, NAT’L ARB. & MEDIATION, <https://www.namadr.com/resources/rules-fees-forms> [<https://perma.cc/D95G-KC84>]; *JW Commercial Rules*, *supra* note 54; *USA&M Rules of Arbitration*, U.S. ARB. & MEDIATION, <https://usam.com/rules-of-arbitration> [<https://perma.cc/9SKK-4X3R>].

National Academy of Arbitrators.²⁰³ However, this faint echo of notice-and-comment rulemaking was a one-time occurrence: the AAA and JAMS do not consult stakeholders every time they update their code.²⁰⁴ Therefore, while the Federal Rules are built on compromise, the Arbitration Rules reflect the undiluted vision of each provider.

Whether readers find this troubling probably depends on what they think about privatization. The opacity of arbitration rulemaking will be most alarming to those who subscribe to the “[g]overnance [c]ritique” of forced arbitration.²⁰⁵ Scholars like J. Maria Glover,²⁰⁶ Margaret Jane Radin,²⁰⁷ and myself (a decade ago)²⁰⁸ have argued that the Court’s aggrandizement of the FAA degrades our democracy. Seen through this lens, companies use arbitration clauses to erase entitlements that were created by elected representatives. For example, though class arbitration waivers, businesses can delete legislation that permits consumers and employees to assert small claims.²⁰⁹ To be sure, people “consent” to these rights-stripping provisions by clicking “I agree” or signing on the dotted line. Yet because nobody reads the fine print, and because a single firm’s terms and conditions can bind hundreds of millions of people, these “contracts” actually operate as private statutes.²¹⁰ Thus, the theory concludes, corporations harness arbitration to engage in private lawmaking.

203. See Harding, *supra* note 70, at 390; Drahozal & Rutledge, *supra* note 69, at 1133 (noting that because the Due Process protocols and Minimum Standards were “hammered out through dialogue between the industry and advocates for employees and consumers, they arguably offer a relatively balanced metric rather than a biased one”). But see Green, *supra* note 70, at 215 (criticizing these measures for failing to include “representatives from many of the very classes of individuals the civil rights statutes were erected to protect”).

204. See Drahozal & Rutledge, *supra* note 69, at 1133 n.91.

205. David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 1006–09 (2017).

206. See J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3052 (2015) (“Through private arbitration contracts, private parties can effectively rewrite substantive law by rendering a host of legal claims mere nullities.”).

207. See MARGARET JANE RADIN, *BOILERPLATE* 33 (2013) (asserting that the widespread use of standard form contracts replaces state-created law “with a governance scheme that is more favorable to the firm”).

208. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 483–84 (2011) (arguing that the Court’s interpretation of the FAA permits the drafters of arbitration clauses to rewrite the Federal Rules and thus alter substantive outcomes).

209. See, e.g., Glover, *supra* note 206, at 3057 (“Through the procedural device of private arbitration, private parties have the quasi-lawmaking power to write substantive law largely off the books by precluding or severely impeding the assertion of various civil claims.”).

210. See, e.g., Horton, *supra* note 208, at 487–89.

To governance critics, the Arbitration Rules are further proof of this legitimacy gap. According to their logic, because procedure impacts substance, procedural rulemaking needs to be tethered to the will of the people.²¹¹ Indeed, that is why the Rules Enabling Act establishes checks on the unelected Federal Rules Committees, such as the notice-and-comment period and the specter of congressional disapproval. However, thanks to the Court's infatuation with the FAA, providers have been able to end-run these safeguards and design procedures in an impenetrable bubble. And again, the mechanism that supposedly justifies this result—assent—is a charade. Even putting the flimsiness of consent to arbitration to one side, the idea that any one truly consents to specific *Arbitration Rules* is beyond the pale. As noted, these principles do not even appear on the face of the contract; rather, they are incorporated through fleeting reference to the “ADR Services’ [A]rbitration [R]ules,”²¹² “the Commercial Rules of the American Arbitration Association”²¹³ or the “JAMS Comprehensive Arbitration Rules and Procedures.”²¹⁴ Therefore, the Arbitration Rules are yet another way in which we have allowed private parties to wield public power.

But commentators who are less starry-eyed about state control would argue that there are benefits to cutting the red tape of court rulemaking. As Stephen Yeazell has quipped, “[i]t requires more steps to amend a Federal Rule of Civil Procedure than it does to amend the U.S. Constitution.”²¹⁵ Compared to this lumbering elephant, the process of drafting private procedures is exceedingly nimble. Indeed, as Christopher Drahozal and Peter “Bo” Rutledge have observed, because

211. *But see* Bone, *supra* note 195, at 909 (questioning this reasoning because “if outcome effects alone were sufficient to trigger concern [about democratic legitimacy], then *all* state decisions would have to be made by processes styled on legislation, even those decisions belonging to the common law”).

212. *GAC Int’l, LLC v. Roth Licensing, LLC*, No. 15-CV-2375, 2019 WL 174972, at *1 (E.D.N.Y. Jan. 11, 2019).

213. *Valley Tool & Die, Inc. v. Fastenal Co.*, No. 1:18CV2682, 2019 WL 548597, at *3 (N.D. Ohio Feb. 12, 2019).

214. *Parada v. Superior Ct.*, 98 Cal. Rptr. 3d 743, 750 (Ct. App. 2009). Other companies select a provider’s Arbitration Rules without specifying which ones. *See, e.g., Terms of Use*, HEDGES HEALTHMART PHARMACY, <https://www.hedgespharmacy.com/terms-of-use> [<https://perma.cc/85T4-XMVV>] (designating the “rules of the American Arbitration Association which are in effect on the date a dispute is submitted to the American Arbitration Association”).

215. Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 235 (1998).

providers can freely alter Arbitration Rules, these principles are “easily changed and adapted to evolving circumstances.”²¹⁶

Similarly, privatization proponents might challenge the claim that providers enjoy freedom from governmental oversight. Over the decades, courts have left an imprint on the Arbitration Rules by reviewing arbitration clauses and awards. For example, arbitration traditionally featured “little or no discovery.”²¹⁷ However, in *Armendariz v. Foundation Health Psychcare Services, Inc.*, the California Supreme Court held that employees were “entitled to discovery sufficient to adequately arbitrate their statutory claim[s], including access to essential documents and witnesses.”²¹⁸ After *Armendariz*, most arbitration administrators began setting discovery floors in certain cases.²¹⁹ Likewise, when the AAA adopted its Due Process Protocols, its initial Employment Rules said “[n]othing [about] . . . how an arbitrator’s compensation is to be allocated.”²²⁰ But then the D.C. Circuit filled this vacuum by holding that “an arbitrator’s compensation and expenses must be paid by the employer alone.”²²¹ In these ways, judges keep providers in line.²²²

216. Drahozal & Rutledge, *supra* note 69, at 1132.

217. Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 8.

218. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 684 (Cal. 2000). Under *Armendariz*, although “[d]iscovery as broad as that provided in court is not required,” plaintiffs still must be able to “vindicate their public rights.” *Shoals v. Owens & Minor Distrib., Inc.*, No. 2:18-CV-2355, 2018 WL 5761764, at *5 (E.D. Cal. Oct. 31, 2018).

219. See *infra* text accompanying notes 264.

220. *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1481 (D.C. Cir. 1997).

221. *Id.*; see also *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999) (“We reject a presumption that arbitrators will be unable to perform in a competent and impartial manner if one party pays the bill.”). Today, most providers embrace this “employer pays” policy for forced arbitrations. See *Employment/Workplace Fee Schedule*, AM. ARB. ASS’N (Nov. 1, 2019), https://www.adr.org/sites/default/files/Employment_Fee_Schedule1Nov19.pdf [<https://perma.cc/7UG8NVUQ>]; *JAMS Employment Rules*, *supra* note 162, at r. 31(c).

222. But then again, judicial review is almost certainly less effective than oversight by elected officials or their proxies. For example, in securities arbitration, the Financial Industry Regulatory Authority (FINRA, which was once known as the National Association of Securities Dealers (NASD)) must clear its Arbitration Rules with the Securities and Exchange Commission (SEC). See Stipanowich, *supra* note 141, at 4. This layer of state supervision proved to be important in 1996, when the NASD proposed a new Arbitration Rule that limited its customers’ ability to win punitive damages against brokerages. See *id.* The SEC was inundated with complaints and torpedoed the Rule. See Richard Karp, *Stalled*, WALL ST. J. (Mar. 16, 1998, 12:01 AM), <https://www.wsj.com/articles/SB889832241816388500> [<https://perma.cc/GVX9-Z5W7>].

Ultimately, members of both camps would likely agree that a key question is whether private procedural rulemaking has triggered a race to the bottom. After all, the Federal Rules Committees must try to harmonize various perspectives and find the common good, but providers have financial incentives to appease the corporations that drive the market for organized arbitration. So as a practical matter, do arbitration administrators draft procedures that favor businesses?

The evidence is mixed. On the one hand, some providers have bowed to the wishes of their primary clientele. The most infamous example is the National Arbitration Forum (NAF). The NAF was once the largest administrator of debt collection arbitrations in the country, handling over 200,000 such cases each year.²²³ It achieved this status by creating Arbitration Rules that were hostile to consumers. For instance, NAF Rule 29(c) only allowed discovery when its cost was justified by the amount of the claim.²²⁴ This policy effectively barred any pre-hearing information exchanges, because parties in debt collection matters rarely seek relief for more than a few hundred dollars. Likewise, before cases like *Concepcion* made class arbitration waivers bulletproof, NAF Rule 19 required any consumer who wished to represent a class to obtain the consent of all prospective plaintiffs and submit copies of their arbitration agreements.²²⁵ This was rarely possible, as “all such pertinent data was within [the defendant’s] exclusive possession.”²²⁶ As it turned out, this pro-business tilt was no coincidence: the Minnesota Attorney General eventually discovered that the NAF had financial ties to New York hedge funds that also owned a major debt collector.²²⁷

Likewise, in 2004, JAMS announced that it would no longer enforce class arbitration waivers.²²⁸ However, JAMS’s regular “corporate users were ... furious” and “made clear that there were other

223. See Press Release, Minn. Off. of the Att’y Gen., National Arbitration Forum Barred from Credit Card and Consumer Arbitrations Under Agreement with Attorney General Swanson (July 19, 2009) [hereinafter NAF Press Release], <https://pubcit.typepad.com/files/nafconsentdecree.pdf> [<https://perma.cc/G6JT-38CE>].

224. See *Muhammad v. Cnty. Bank of Rehoboth Beach*, 912 A.2d 88, 93 n.1 (N.J. 2006) (noting that the provider “allows mandatory discovery where the ‘cost [of discovery] is commensurate with the amount of the [c]laim’”).

225. See *Betts v. FastFunding The Co., Inc.*, 60 So. 3d 1079, 1081 (Fla. Dist. Ct. App. 2011).

226. *Id.*

227. See NAF Press Release, *supra* note 223, at 1. The state attorney general sued, and NAF entered into a consent decree in which it promised to stop arbitrating debt collection matters. *Id.*

228. See Kelly Thompson Cochran & Eric J. Mogilnicki, *Current Issues in Consumer Arbitration*, 60 BUS. LAW. 785, 793–94 (2005).

alternative forums.”²²⁹ These threats had their intended effect: shortly after unveiling the policy, JAMS abandoned it.²³⁰

Yet on the other hand, providers’ and firms’ motivations may not be so simple. For example, corporations appear to select the AAA more than any of its rivals.²³¹ This would be unwise if a company’s objective was to suppress claims: indeed, the AAA’s forced arbitration Rules are plaintiff-friendly.²³² Instead of forum shopping for procedural advantages, businesses might be drawn to the certainty that comes with the AAA’s “court- and time-tested” code.²³³ As mentioned, the AAA has long sought to create procedures that insulate its dispute resolution machinery from judicial review.²³⁴ Arguably, then, what drafters *really* value is the knowledge that their clauses and awards will be upheld.²³⁵ In turn, this would mean that the market—and not interest group input or governmental supervision—protects consumers and employees.

In sum, for better or for worse, the Federal Rules arise from consensus, but providers create the Arbitration Rules unilaterally and in secret. As a result, arbitration administrators are free to compete along whatever axis they think will attract the most business. In addition, as the next section discusses, the basic layout of procedural rules in arbitration also departs from the architecture of those in court.

229. Philip Allen Lacovara, *Class Action Arbitrations: The Challenge for the Business Community*, 24 ARB. INT’L 541, 546 (2008).

230. See Cochran & Mogilnicki, *supra* note 228, at 794.

231. For example, a co-author and I examined forced arbitrations that were filed between January 1, 2010, and December 31, 2016, and found that the AAA handled 14,691 consumer cases and 12,641 employment cases, JAMS oversaw 2,094 consumer disputes, 2,463 employment disputes, and 808 tort disputes, and ADR Services managed 2,037 tort matters, 1,132 employment matters, and 133 consumer matters. See Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 32, 39, 44 (2019); see also Drahozal & Rutledge, *supra* note 69, at 1126 (showing data that suggested the AAA dominated samples of credit card and franchise agreements); cf. Erin O’Hara O’Connor, Kenneth J. Martin & Randall S. Thomas, *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 163 (2012) (same for executive employment agreements).

232. See *supra* text accompanying notes 160–63.

233. *What We Do*, *supra* note 46.

234. See *supra* text accompanying notes 119–21.

235. Cf. Drahozal & Rutledge, *supra* note 69, at 1134–35 (theorizing that “[a]n arbitrator (or institution) whose awards are routinely set aside will not be in the business for long”).

B. TRANS-SUBSTANTIVITY AND UNIFORMITY

A hallmark of the Federal Rules is that they are trans-substantive and uniform. Indeed, as every first-year law student learns, the Federal Rules control all federal civil cases, “regardless of complexity, substantive context, or claim size.”²³⁶ But as this section explains, the Arbitration Rules break this mold.

Litigation codes are highly standardized. As noted above, procedure was once fragmented and unpredictable, and “methods of trial available in [one] action . . . were not necessarily available in another.”²³⁷ The Federal Rules famously solved this problem by applying across-the-board to every lawsuit in every federal court.²³⁸ This trans-substantive and uniform ideal has weathered its share of criticism, but “still has a strong hold on rulemaking today.”²³⁹

The Arbitration Rules are starkly different. First, they flip trans-substantivity on its head. Recall that the AAA began creating sub-Rules for particular cases in the 1940s.²⁴⁰ This trend has accelerated to light speed. The AAA now offers more than a dozen bespoke codes, such as Domain Name Disputes,²⁴¹ Election Arbitration Rules,²⁴² Employee Benefit Plan Claims Arbitration Rules,²⁴³ Home Construction

236. Arthur R. Miller, *Widening the Lens: Refocusing the Litigation Cost-and-Delay Narrative*, 40 CARDOZO L. REV. 57, 97 (2018).

237. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 52 (2d ed. 1979) (“Procedures and methods of trial available in an action commenced by one kind of writ were not necessarily available in another.”); see also F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (A.H. Chaytor & W.J. Whittaker eds., 1962) (noting that, under the ancient writ system, “methods of procedure [were] adapted to cases of different kinds”).

238. See *supra* text accompanying notes 95–96.

239. Robert G. Bone, “To Encourage Settlement”: Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure, 102 NW. U. L. REV. 1561, 1619 (2008). Likewise, the Federal Rules of Evidence “apply the same way in different kinds of cases and treat different types of litigants similarly.” David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 306 (1994–1995).

240. See *supra* text accompanying notes 131–33.

241. AM. ARB. ASS’N, AAA DOMAIN NAME DISPUTES SUPPLEMENTARY RULES (2011), https://www.adr.org/sites/default/files/AAA_Domain_Name_Disputes_Supplementary_Rules_0.pdf [<https://perma.cc/KN8F-JWFF>].

242. AM. ARB. ASS’N, ELECTION ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION (2014), <https://www.adr.org/sites/default/files/Election%20Arbitration%20Rules.pdf> [<https://perma.cc/7B97-LTTM>].

243. AM. ARB. ASS’N, EMPLOYEE BENEFIT PLAN CLAIMS ARBITRATION RULES (2013), <https://www.adr.org/sites/default/files/Employee%20Benefit%20Plan%20Claims%20Arbitration%20Rules.pdf> [<https://perma.cc/TF8N-KTVX>].

Arbitration Rules and Mediation Procedures,²⁴⁴ and Wireless Industry Arbitration Rules.²⁴⁵ Likewise, JAMS boasts Comprehensive Arbitration Rules and Procedures,²⁴⁶ Streamlined Arbitration Rules and Procedures,²⁴⁷ Engineering and Construction Arbitration Rules & Procedures,²⁴⁸ Employment Arbitration Rules & Procedures,²⁴⁹ and International Arbitration Rules.²⁵⁰ Finally, the Forum classifies disputes as either Business-to-Business,²⁵¹ Employment,²⁵² Franchise,²⁵³ or Intellectual Property.²⁵⁴ NAM uses Standard Rules,²⁵⁵ Comprehensive Rules,²⁵⁶ Employment Rules²⁵⁷ and Realtor/Homeowner Rules,²⁵⁸ and USA&M has issued addendums to its code for consumer

244. AM. ARB. ASS'N, HOME CONSTRUCTION ARBITRATION RULES AND MEDIATION PROCEDURES (2018), https://www.adr.org/sites/default/files/Home_Construction_Arbitration_Rules_and_Mediation_Procedures.pdf [<https://perma.cc/25E5-PSS9>].

245. AM. ARB. ASS'N, WIRELESS INDUSTRY ARBITRATION RULES (2016), https://www.adr.org/sites/default/files/AAA_Wireless_Rules.pdf [<https://perma.cc/Y9JB-HXDX>].

246. JAMS COMPREHENSIVE RULES, *supra* note 54.

247. JAMS STREAMLINED RULES, *supra* note 162.

248. JAMS, JAMS ENGINEERING AND CONSTRUCTION ARBITRATION RULES & PROCEDURES (2014), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_construction_rules-2014.pdf [<https://perma.cc/PFE2-BG8H>].

249. JAMS Employment Rules, *supra* note 162.

250. JAMS International Arbitration Rules & Procedures, JAMS (Sept. 1, 2016), <https://www.jamsadr.com/international-arbitration-rules/English> [<https://perma.cc/KS9M-CRM4>].

251. FORUM, CODE OF PROCEDURE FOR RESOLVING BUSINESS-TO-BUSINESS DISPUTES, https://www.adrforum.com/assets/resources/Arbitration/Rules/Forum.B2B_Rules.v2.3.pdf [<https://perma.cc/SC4G-CUBD>].

252. FORUM, CODE OF PROCEDURE FOR RESOLVING EMPLOYMENT DISPUTES, https://www.adrforum.com/assets/resources/Arbitration/Rules/Forum.Employment_Rules.v2.4.pdf [<https://perma.cc/X7RC-J85M>].

253. FORUM, CODE OF PROCEDURE FOR RESOLVING FRANCHISE DISPUTES, https://www.adrforum.com/assets/resources/Arbitration/Rules/Forum.Franchise_Rules.v2.4.pdf [<https://perma.cc/V5MM-UWG9>].

254. FORUM, CODE OF PROCEDURE FOR RESOLVING INTELLECTUAL PROPERTY DISPUTES, https://www.adrforum.com/assets/resources/Arbitration/Rules/Forum.IP_Rules.v2.2.pdf [<https://perma.cc/Y4SV-ARSS>].

255. NAT'L ARB. & MEDIATION, NAM STANDARD RULES AND PROCEDURES (2019) [hereinafter NAM STANDARD RULES], <https://www.namadr.com/content/uploads/2020/04/RULES-STANDARD.pdf> [<https://perma.cc/F2RJ-YEH3>].

256. NAT'L ARB. & MEDIATION, NAM COMPREHENSIVE DISPUTE RESOLUTION RULES AND PROCEDURES (2019) [hereinafter NAM COMPREHENSIVE RULES], <https://www.namadr.com/content/uploads/2019/11/Comprehensive-Rules-revised-9.18.19.pdf> [<https://perma.cc/FD5G-SJWM>].

257. NAM EMPLOYMENT RULES, *supra* note 19.

258. See NAM COMPREHENSIVE RULES, *supra* note 256.

and personal injury matters.²⁵⁹ I will call this menu of Rules *within* providers “case type variation.”²⁶⁰

Second, instead of being uniform, the Arbitration Rules vary *between* providers. Although these codes share common threads—such as giving arbitrators nearly unfettered discretion²⁶¹—each one bears the distinctive stamp of its drafter. For instance, in employment cases, NAM guarantees each side three depositions,²⁶² JAMS and JW offer one,²⁶³ and the AAA blandly declares that the arbitrator “shall have the authority to order such discovery . . . as [he or she] considers necessary.”²⁶⁴ Likewise, JAMS freely permits summary judgment motions,²⁶⁵ but the AAA imposes a threshold barrier: “[T]he moving party [must] show[] substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.”²⁶⁶ Thus, cases progress in lockstep under the Federal Rules, but march to the beat of each provider under the Arbitration Rules.

Third, because most Arbitration Rules are mere defaults, drafters can modify them. Indeed, private dispute resolution “allows parties the contractual freedom to tailor their procedural rules as they see fit.”²⁶⁷ As a result, firms often customize the statute of limitations,²⁶⁸ the aegis of discovery,²⁶⁹ and the ability to recover attorneys’ fees.²⁷⁰ These made-to-order procedures override inconsistent Arbitration

259. See USA&M RULES, *supra* note 54, at r. 24.

260. To be sure, these mini-statutes do not single out particular *claims* for special treatment. But by separating disputes into categories, they effectively achieve the same result. For example, in the AAA, all Title VII claims trigger the Employment Rules, and all unfair competition allegations fall under the Consumer Rules.

261. See *supra* text accompanying notes 169–73.

262. NAM EMPLOYMENT RULES, *supra* note 19, at r. 11(B)(ii).

263. JAMS *Employment Rules*, *supra* note 162, at r. 17; JW *Commercial Rules*, *supra* note 54 at r. 8.B.2.

264. AAA EMPLOYMENT RULES, *supra* note 162, at r. 9.

265. JAMS *Employment Rules*, *supra* note 162, at r. 18.

266. AAA EMPLOYMENT RULES, *supra* note 162, at r. 27.

267. Logan S. Kotler, Comment, *Reconciling Contractualized Procedure in Litigation and Arbitration: A Textual and Policy-Based Approach*, 65 EMORY L.J. 1177, 1178 (2016).

268. See, e.g., *Jones v. Deja Vu, Inc.*, 419 F. Supp. 2d 1146, 1149 (N.D. Cal. 2005) (involving an arbitration clause with a six-month statute of limitations).

269. See, e.g., *DeGroff v. MascoTech Forming Techs.-Fort Wayne, Inc.*, 179 F. Supp. 2d 896, 908 (N.D. Ind. 2001) (featuring an arbitration agreement that “limits discovery to one deposition”).

270. See, e.g., *Sanchez v. Nitro Lift Techs., LLC*, 91 F. Supp. 3d 1218, 1221 (E.D. Okla. 2015) (quoting a clause providing that “costs (including without limitation, reasonable fees and expenses of counsel and experts for the Disputing Parties) . . . shall be borne by the Disputing Party whom the decision of the arbitrator is against”).

Rules.²⁷¹ I will call this aspect of arbitration procedures “party variation.”²⁷²

This procedural plasticity has several advantages. For one, case type variation allows providers to acknowledge that not all complaints warrant the same process. Civil procedure scholars have long objected that trans-substantivity has become outmoded.²⁷³ According to these critics, procedural genericism made sense in 1938, when the federal docket consisted of straightforward tort and breach of contract disputes, but is no longer suitable in our era of civil rights statutes, class actions, and impact litigation:

271. See, e.g., *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 832 (11th Cir. 1991) (“[A]rbitration rules are incorporated only to the extent that they do not conflict with the express provisions of the arbitration agreement.”); *Tremcorp Holdings, Inc. v. Harris*, No. S. Ct. Civ. 2016-0013, 2017 WL 3082454, at *4 (V.I. July 19, 2017) (involving parties who submitted to the arbitrator “their agreed-upon rules . . . , which were significantly modified from the AAA rules that they were based upon, with numerous rules crossed-out or otherwise amended”); *Stipanowich*, *supra* note 70, at 433 (“As a creature of contract, arbitration is essentially what the parties make it.”). In fact, the Arbitration Rules themselves often invite parties to “agree on any procedures not specified in these rules.” ADR SERVICES RULES, *supra* note 54, at r. 1–2; *JAMS Streamlined Rules*, *supra* note 162, at r. 2(a) (“The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies.”); NAM STANDARD RULES, *supra* note 255, at r. 1 (“The parties are free . . . to enter into a written agreement, at any time, to amend or modify any of NAM’s rules for their case.”); *JW Commercial Rules*, *supra* note 54, at r. 2.A.3 (“The parties, with the approval of the arbitrator, may establish their own arbitration rules, or modify in writing any aspect of the governing rules.”).

272. There is one exception to party variation: Rule 1 of the AAA Employment Rules purport to make the rest of the code *mandatory*. See AAA EMPLOYMENT RULES, *supra* note 162, at r. 1 (“If a party establishes that an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules.”). Unfortunately, I do not have room in this Article to address the black swan of immutable Arbitration Rules. But I would be remiss if I did not flag the chicken-and-egg dilemma that arises when an arbitration clause purports to trump any inconsistent AAA Rules. Can parties contract around the Arbitration Rule that prevents parties from contracting around the Arbitration Rules? The few courts that have addressed the issue have spoken with a single voice and “resolve[d] this conflict between the arbitration agreement and the AAA rules in favor of the arbitration agreement.” *Brady v. Williams Cap. Grp.*, 878 N.Y.S.2d 693 (App. Div. 2009), *aff’d as modified*, 928 N.E.2d 383 (N.Y. 2010); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 678–80 (6th Cir. 2003) (ignoring Rule 1 because the “arbitration agreement provides that its terms should apply if any of its provisions conflict with AAA rules”); *Ontiveros v. DHL Express (USA), Inc.*, 79 Cal. Rptr. 3d 471, 486 (Ct. App. 2008) (“[B]ecause a specific provision of the agreement, by its very terms, trumps the otherwise applicable AAA . . . rules, those rules do not apply.”).

273. See, e.g., *Marcus*, *supra* note 95, at 372. In addition, in the 1990s, Congress enacted substance-specific procedural rules like the Prison Litigation Reform Act and the Private Securities Litigation Reform Act. See *id.* at 404–07.

It is by no means intuitively apparent that the procedural needs of a complex antitrust action, a simple automobile negligence case, a hard-fought school integration suit, and an environmental class action to restrain the building of a pipeline are sufficiently identical to be usefully encompassed in a single set of rules which makes virtually no distinctions among such cases in terms of available process.²⁷⁴

Thus, there have been no shortage of proposals to “segregate[] cases and assign[] them to different processing tracks either by dimension, complexity, or substance.”²⁷⁵

And that is what the Arbitration Rules do. For example, the general arbitrator-selection mechanism operates as follows: providers submit a list of between five and twelve potential decision-makers to the parties,²⁷⁶ who have about two weeks to strike some and rank the others.²⁷⁷ But this time-consuming step may be overkill in low-stakes cases. As a result, under the AAA Consumer Rules and in NAM matters where the amount in controversy is less than \$10,000, providers simply appoint an arbitrator from their roster.²⁷⁸ Thus, the Arbitration Rules adjust the procedural dial to accommodate the nature of the dispute.

274. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732 (1975); Marcus, *supra* note 95, at 372 (“The 1938 authors likely did not foresee the asbestos leviathan, class actions with up to 100 million plaintiffs, or other enormously complicated fields of litigation that beg for specialized procedural treatment.”); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 525–26 (1986) (cataloguing ways in which federal practice has changed in the last half-century).

275. Miller, *supra* note 236, at 98; Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 333–34 (2008) (“[W]e must bury, once and for all, the thoroughly misguided idea that trans-substantivity is an independent value or ideal for the Federal Rules.”); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1940 (1989) (arguing that the supposed virtues of trans-substantivity are “a sham”); Resnik, *supra* note 274, at 547 (“We must face that, whatever the horrors of forms of action, we need to determine what subsets of cases require special kinds of rules, and write rules for those kinds of cases.”).

276. See AAA COMMERCIAL RULES, *supra* note 23, at r. R-12(a) (ten names); JAMS Employment Rules, *supra* note 162, at r. 15(b) (five names); JAMS Streamlined Rules, *supra* note 162, at r. 12(c) (at least three names); NAM EMPLOYMENT RULES, *supra* note 19, at r. 7 (seven names); JW Commercial Rules, *supra* note 54, at r.5A.3.c (five names); cf. ARC RULES, *supra* note 54, at r. 3 (a number of names that is “one more than the number of parties”).

277. See AAA COMMERCIAL RULES, *supra* note 23, at r. R-12(a); AAA EMPLOYMENT RULES, *supra* note 162, at r. 12.c.ii; ADR SERVICES RULES, *supra* note 54, at r. 11 (permitting parties to strike three of ten names); JAMS COMPREHENSIVE RULES, *supra* note 54, at r. 15(b)–(c) (allowing parties to strike two names).

278. AAA CONSUMER RULES, *supra* note 162, at r. R-16; NAM COMPREHENSIVE RULES, *supra* note 256, at r. 22.A.

Case type variation also allows providers to level the playing field in forced arbitration. As mentioned above, the AAA and JAMS have adopted protections for consumer and employment matters.²⁷⁹ These measures would be impossible under the shackles of a trans-substantive regime, which would insist on treating a plaintiff with a small-dollar gripe about a product exactly the same as a multi-national conglomerate with an intellectual property claim.

In addition, institutional and party variation fosters innovation. Litigation is litigation, but arbitration is, “at bottom[,] little more than ‘the parties’ dream.’”²⁸⁰ For instance, the AAA allows arbitrators to decide consumer claims for less than \$25,000 without a hearing (a “desk arbitration”),²⁸¹ and JAMS sponsors “bracketed arbitration” (in which the parties agree to minimum and maximum damage amounts)²⁸² and “baseball arbitration” (where each party suggests a remedy and the arbitrator must pick one of them).²⁸³

But the mutability of the Arbitration Rules also skews the system in favor of repeat players. Trans-substantive and uniform procedures are simple. Indeed, when there is a single code, pro se litigants can easily find the relevant principles, and “lawyers do not need to relearn procedure every time they delve into a new field of substantive doctrine.”²⁸⁴ By contrast, the dizzying heterogeneity of the Arbitration Rules is not user-friendly. Even an issue as fundamental as the admission of evidence²⁸⁵ varies widely between discrete sets of Arbitration Rules. For instance, NAM’s *Standard* Rules state that “the Federal Rules of Evidence shall be followed at all hearings,”²⁸⁶ but NAM’s *Comprehensive* Rules declare that “strict conformity to the Federal Rules

279. See *supra* text accompanying notes 159–65.

280. Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT’L L.J. 449, 449 (2005) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 336 (1958)).

281. See AAA CONSUMER RULES, *supra* note 162, at r. R-1(g). Other providers allow the parties to choose this option. See NAM STANDARD RULES, *supra* note 255, at r. 9 (“The parties may elect to have an accelerated hearing which does not permit hearing live testimony by non-party witnesses. In general, accelerated hearings are concluded within a matter of hours.”).

282. See JAMS Streamlined Rules, *supra* note 162, at r. 27.

283. See *id.* at r. 28.

284. Marcus, *supra* note 95, at 372.

285. Of course, the court system separates rules of procedure and evidence. However, the Arbitration Rules combine them, so I do as well. Also, as observed *supra* note 238, the Federal Rules of Evidence, like the Federal Rules of Civil Procedure, are supposed to be trans-substantive.

286. NAM STANDARD RULES, *supra* note 255, at r. 13.C.i.

of Evidence is not required.”²⁸⁷ Likewise, ADR Services, JAMS, and JW preserve the protections normally given to privileges and work product,²⁸⁸ but other providers do not.²⁸⁹ This complexity rewards parties and lawyers who routinely arbitrate and can absorb nuances over time. It might be one reason why studies show that there is an “extreme repeat player” effect in forced arbitration: businesses and plaintiffs’ law firms that frequently appear in a particular provider are also especially likely to prevail on the merits.²⁹⁰ Ironically, then, the Arbitration Rules resurrect the pre-Federal Rules phenomenon of procedure under “a veritable minefield of ‘disconnected, inharmonious . . . statutes.’”²⁹¹

Finally, to abandon trans-substantivity is to remove a constraint on procedural rule-makers. Because members of the Federal Rules Committees are not elected, their handiwork must be apolitical.²⁹² Trans-substantivity maintains this balance because it prevents the Committees from making assessments about the desirability of certain causes of action.²⁹³ If a procedural code, say, prohibits defendants from filing dispositive motions in asbestos cases but allows them in section 1983 disputes, it has made an implicit judgment that mass torts sit higher on the totem pole than civil rights litigation. By taking this option off the table, trans-substantivity bolsters the legitimacy of rulemaking by experts who have never appeared on a ballot.²⁹⁴ Yet the Arbitration Rules, which already have shaky democratic footing, enable precisely the kind of gerrymandered procedures that the Federal

287. NAM COMPREHENSIVE RULES, *supra* note 256, at r. 28.C.

288. See ADR SERVICES RULES, *supra* note 54, at r. 33(d) (“[T]he arbitrator shall apply applicable law relating to privileges and work product . . .”); JW Commercial Rules, *supra* note 54, at r. 12.C.1 (same); JAMS COMPREHENSIVE RULES, *supra* note 54, at r. 22(d) (same); *id.* at r. 22(f) (“The [p]arties will not offer as evidence, and the [a]rbitrator shall neither admit into the record nor consider, prior settlement offers by the [p]arties”); JAMS Streamlined Rules, *supra* note 162, at r. 17(d), (f).

289. See AAA EMPLOYMENT RULES, *supra* note 162, at r. 30 (“The arbitrator shall be the judge of the relevance and materiality of the evidence offered . . .”); AAA CONSUMER RULES, *supra* note 162, at r. R-34(c) (“The arbitrator shall consider applicable principles of legal privilege, such as those that involve the confidentiality of communications between a lawyer and a client.”).

290. See Chandrasekher & Horton, *supra* note 231, at 58 (reporting that “high-level” and “super” repeat playing businesses and plaintiffs’ law firms outperformed their one-shot counterparts in the AAA, JAMS, ADR Services, and Kaiser Permanente).

291. Aragaki, *supra* note 100, at 1965 (quoting *Simplification of Judicial Procedure: Hearings Pursuant to S. Res. 552 Before the Subcomm. of the S. Comm. on the Judiciary*, 64th Cong. 13 (1915) (statement of Thomas W. Shelton)).

292. See Marcus, *supra* note 95, at 378.

293. See *id.*

294. See *id.*

Rules avoid. Although providers' codes fluctuate with the general type of case—not the specific cause of action—they nevertheless subject different plaintiffs to unique procedures. For instance, NAM's Employment Rules offer at least three depositions, twenty interrogatories, and thirty requests for documents,²⁹⁵ but NAM's Comprehensive Rules contain no discovery guarantees.²⁹⁶ Regardless of whether this is a wise policy decision, it is a policy decision.²⁹⁷ Thus, by embracing substance-specificity, providers can do what court rule-makers cannot: superimpose their own normative perspectives on procedure.

To conclude, the Federal Rules are a monolith, but the Arbitration Rules are a mosaic. As the Article discusses next, the two procedural schemes also seek to accomplish different goals.

C. ACCURACY AND EFFICIENCY

An elementary question in procedural design is whether to favor accuracy or efficiency. As this section explains, the Federal Rules try to balance these competing objectives, but the Arbitration Rules do not.

Procedures in the court system are supposed to walk a tightrope. On the one hand, litigation must generate outcomes that are "correct." This tips the scales toward adopting forgiving pleading standards, liberal discovery rules, and searching appellate review.²⁹⁸ But on the other hand, courts need to propel cases through the system at an acceptable pace and expense. This requires enacting hardnosed limitations on the parties' access to information and opportunities to persuade.²⁹⁹ The Federal Rules are pitched at the midpoint between these extremes. Indeed, as Rule 1 announces, the Federal Rules strive "to secure the just, speedy, and inexpensive determination of every action and proceeding."³⁰⁰

As is well-known, arbitration is built for haste, not precision. The FAA reflects this preference by making the scope of judicial review of

295. See NAM EMPLOYMENT RULES, *supra* note 19, at r.11(B)(i).

296. See NAM COMPREHENSIVE RULES, *supra* note 256, at r. 18(A).

297. To be fair, Arbitration Rules that treat employment claims differently from other claims can often be traced back to judicial rulings that require additional protections for employee plaintiffs. See *supra* text accompanying notes 217–32.

298. See, e.g., SUBCOMM. ON LONG RANGE PLAN., A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING: A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 168 F.R.D. 679, 693 (1995) (describing this as the "primacy of fairness" view of procedure).

299. See *id.* (calling this the "primary of efficiency" perspective).

300. FED. R. CIV. P. 1.

arbitration awards “among the narrowest known at law.”³⁰¹ Likewise, the Arbitration Rules codify several famously streamlined attributes of private dispute resolution. For instance, the Federal Rules entitle parties to ten depositions and twenty-five written interrogatories.³⁰² But although the Arbitration Rules vary by institution and case type, they generally “do not [permit] comprehensive discovery,” which “would be contrary to [the] goal of efficient and economical resolutions.”³⁰³ Similarly, federal judges can take as long as they want to write opinions³⁰⁴ and must explain their logic.³⁰⁵ By contrast, arbitrators often need to rule within thirty days of the hearing³⁰⁶ and do not necessarily have to justify their conclusions.³⁰⁷ Sleek features like these are why arbitration enjoys a reputation for being “quicker and less costly than litigation.”³⁰⁸

301. Balch v. Oracle Corp., No. CV DKC 19-1353, 2019 WL 6052670, at *3 (D. Md. Nov. 15, 2019); *see also supra* text accompanying note 106.

302. *See* FED. R. CIV. P. 30(a)(2), 33(a).

303. NAM STANDARD RULES, *supra* note 255, at r. 12.

304. *See* Benjamin Weiser, *Judge's Decisions Are Conspicuously Late*, N.Y. TIMES (Dec. 6, 2004), <https://www.nytimes.com/2004/12/06/nyregion/judges-decisions-are-conspicuously-late.html> [<https://perma.cc/PV6S-W7ES>] (observing that some judges take months or even longer to issue decisions).

305. For instance, in bench trials, “the court must find the facts specially and state its conclusions of law separately.” FED. R. CIV. P. 52(a). Likewise, when resolving a motion for summary judgment, “[t]he court should state on the record the reasons for granting or denying the motion.” FED. R. CIV. P. 56(a). Finally, “[e]very order granting an injunction and every restraining order must: . . . state the reasons why it issued.” FED. R. CIV. P. 65(d)(1)(a).

306. *See* AAA CONSUMER RULES, *supra* note 162, at r. R-42; JAMS Streamlined Rules, *supra* note 162, at r. 19(a); JW Commercial Rules, *supra* note 54, at r. 13.B.1; *cf.* CPR Rules, *supra* note 54, at r. 15.8a (“The final award should in most circumstances be submitted by the Tribunal to CPR within two months after the close of the proceedings.”). Likewise, some providers offer fast-and-furious dispute resolution tracks, such as USA&M’s option for expedited hearings within forty-five days of the opening of the case. *See* USA&M RULES, *supra* note 54, at r. 4.b.

307. *See* USA&M RULES, *supra* note 54, at r. 21.b (“Unless the parties agree otherwise, arbitrators are not required to provide written opinions or explanations with their awards.”); NAM STANDARD RULES, *supra* note 255, at r. 16.A (not requiring reasoned awards). *But see* AAA CONSUMER RULES, *supra* note 162, at r. R-43(b) (instructing the arbitrator to “provide the concise written reasons for the decision unless the parties all agree otherwise”); CPR Rules, *supra* note 54, at r. 15.2 (“All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise.”); JAMS Streamlined Rules, *supra* note 162, at r. 19(g) (“Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.”).

308. APC Home Health Servs., Inc. v. Martinez, 600 S.W.3d 381, 400 (Tex. App. 2019).

However, the Arbitration Rules also prioritize efficiency in less-obvious ways. For one, to make cases fast and final, providers use a merciless waiver doctrine. The AAA, ADR Services, ARC, JAMS, and USA&M declare that “[a]ny party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.”³⁰⁹ This principle makes sense in some contexts. For example, by forcing parties to flag violations of the Rules immediately, the waiver doctrine prevents them from keeping such an argument in their back pocket as insurance against an unfavorable result on the merits.³¹⁰ Yet in other situations, the waiver doctrine shields flawed awards from judicial oversight. Simply because the affected party did not complain in time or in writing, judges have upheld decisions by arbitrators who engaged in “private conversations” with one side,³¹¹ ignored their duty to produce a reasoned award,³¹² and accepted new evidence or legal theories at the eleventh hour.³¹³

309. ADR SERVICES RULES, *supra* note 54, at r. 36; AAA CONSUMER RULES, *supra* note 162, at r. R-50; ARC RULES, *supra* note 54, at r. 18; USA&M RULES, *supra* note 54, at r. 19; *cf.* JAMS COMPREHENSIVE RULES, *supra* note 54, at r. 27(a) (“If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.”).

310. The waiver rule often applies when an arbitrator rules after the thirty-day deadline: a milieu in which a party’s belated protest seems suspicious. *See* Anzalone v. Doan, 540 So. 2d 385, 386 (La. Ct. App. 1989) (“A party should not be permitted to wait and see whether the arbitrator will rule in his or her favor before asserting his or her objection.” (quoting *Five Keys, Inc. v. Pizza Inn, Inc.*, 653 P.2d 870, 873 (N.M. 1982))); *Zervos v. Freedman Props., Ltd.*, 539 A.2d 336, 339 (N.J. Super. Ct. Ch. Div. 1987) (“It was not until after the award had been submitted that Muller . . . expressed an unwillingness to adhere to the award because of its untimeliness.”); *accord* *Davis v. Producers Agric. Ins. Co.*, 762 F.3d 1276, 1287 (11th Cir. 2014); *Darin & Armstrong, Inc. v. Monte Costella, Inc.*, 542 So. 2d 1053, 1054 (Fla. Dist. Ct. App. 1989).

311. *Cellular Radio Corp. v. OKI Am., Inc.*, 664 A.2d 357, 359 (D.C. Cir. 1995).

312. *See* *Steinmann v. ZTE Corp.*, 692 F. App’x 493, 494 (9th Cir. 2017).

313. For instance, in *Allstate Insurance Co. v. Zampedro*, No. 3247, 1983 WL 6040 (Ohio Ct. App. Dec. 30, 1983), the arbitrator permitted a party to submit medical records during the arbitration even though the AAA requires such evidence “to be submitted 20 days prior to [the] hearing.” *Id.* at *1. The other side protested orally. *See id.* An Ohio appellate court held that the “verbal objection . . . was ineffective.” *Id.* at *3; *see also* *Dealer Comput. Servs., Inc. v. Hammonasset Ford Lincoln-Mercury, Inc.*, Civ. Action No. H-08-1865, 2008 WL 5378065, at *2 (S.D. Tex. Dec. 22, 2008) (deciding that a party waived its right to challenge the fact that its adversary “altered its theory of breach of contract in its later filings”); *Ebasco Constructors, Inc. v. Ahtna, Inc.*, 932 P.2d 1312, 1317 (Alaska 1997) (holding that a party waived right to object to the fact that “on the first day of the arbitration proceeding, [the other party] asserted that it was entitled to recovery on the basis of a previously unarticulated theory of liability”); *Fraud v.*

Similarly, providers have maximized arbitral power over arbitrability in the name of expediency. Suppose one party files an arbitration and the other party argues either that the arbitration agreement is invalid or that some claims do not fall within its ambit. Originally, providers respected the fact that the FAA assigns these issues to judges³¹⁴ and instructed both sides “to refer this issue at once to the courts for a determination and arbitrators [to] suspend proceedings while the matter is being decided.”³¹⁵ But then providers recognized that this brought the arbitration to a screeching halt. To maintain arbitration’s rocket-fueled velocity, several institutions adopted Arbitration Rules that allow arbitrators to entertain “any objections with respect to the existence, scope, or validity of the arbitration agreement.”³¹⁶ Thus, the Arbitration Rules allow arbitrators to decide the very question of whether a case should be arbitrated.³¹⁷

Design Ideas, Inc., 551 A.2d 1279, 1282 (Conn. 1989) (determining that a party “waived any objection to the posthearing submission of evidence”); *EEC Prop. Co. v. Kaplan*, 578 N.W.2d 381, 384 (Minn. Ct. App. 1998) (finding that a party waived its right to contest the arbitrator’s imposition of an arguably unrequested remedy). Admittedly, a litigant who fails to object to a trial court’s ruling generally cannot raise the issue on appeal. Yet this rule is not absolute. *See Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1145–47 (9th Cir. 2001) (explaining that federal courts apply the doctrine of “fundamental error” to review claimed violations of “civil case procedures absent an objection”).

314. *See supra* text accompanying note 105.

315. *KELLOR, supra* note 71, at 69.

316. AAA CONSUMER RULES, *supra* note 162, at r. R-14(a); AAA COMMERCIAL RULES, *supra* note 23, at r. R-7(a); AAA EMPLOYMENT RULES, *supra* note 162, at r. 6.a; ADR SERVICES RULES, *supra* note 54, at r. 8 (“Unless the issue of arbitrability has been previously determined by the court, the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.”); *CPR Rules, supra* note 54, at r. 8.1 (“The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, validity or scope of the arbitration agreement.”); *FORUM, supra* note 253, at r. 3.1.E (“An Arbitrator shall have the power to rule on all issues, Claims, Responses, questions of arbitrability, and objections regarding the existence, scope, and validity of the Arbitration Agreement including all objections relating to jurisdiction, unconscionability, contract law, and enforceability of the Arbitration Agreement.”); *cf. JAMS Streamlined Rules, supra* note 162, at r. 8(b) (“Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator.”).

317. To be clear, as a matter of federal common law, arbitrators decide “‘procedural’ questions which grow out of the dispute and bear on its final disposition,” such as laches, estoppel, and compliance with a condition precedent to arbitration. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)). Thus, even without the Arbitration Rules, arbitrators could resolve so-called “procedural arbitrability” themselves.

Doing so blesses a practice that would never pass muster in court. Judges cannot preside over issues that will affect their own pocket-books. For example, federal judges must be disqualified if they have “a financial interest in the subject matter in controversy.”³¹⁸ Likewise, the Due Process Clause of the Fourteenth Amendment prohibits decision-makers from resolving questions in which they have a “direct, personal, substantial, [and] pecuniary” stake.³¹⁹ Nevertheless, providers permit arbitrators to decide arbitrability even though arbitrators have money riding on the outcome. Indeed, because arbitrators bill by the hour, they can keep their meters running by rejecting arbitrability challenges and then presiding over the merits.³²⁰ In this additional way, the Arbitration Rules value speed over accuracy over due process and accuracy.

* * *

Accordingly, the Federal Rules and the Arbitration Rules reflect dueling views about procedure. Many of the Arbitration Rules’ unique characteristics facilitate inventive and cost-effective dispute resolution. However, these departures from court-based norms also produce toxic byproducts: procedures that either intentionally or effectively slant cases toward corporations. This next Part explains how courts can translate these insights into doctrinal recommendations.

III. DOCTRINAL IMPLICATIONS

Because the Arbitration Rules are integral to organized arbitration, they have started to play a leading role in the federal common law that implements the FAA. Indeed, when courts decide whether to enforce an arbitration clause or an award, they often must grapple with providers’ codes. This Part examines three unsettled topics that

318. 28 U.S.C. § 455(b)(4).

319. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986) (quoting *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972)). Admittedly, “the state action element of a due process claim is absent in a private arbitration case.” *Murillo v. A Better Way Wholesale Autos, Inc.*, No. 3:17-CV-1883, 2019 WL 3081062, at *9 (D. Conn. July 15, 2019). Yet my point is not that the Arbitration Rules violate the Due Process Clause; rather, it is simply that they authorize conduct that the judicial system proscribes.

320. In a previous article, I compared a sample of judicial and arbitral rulings on the issue of “clause construction:” whether an arbitration clause that does not mention class actions allows such proceedings. See David Horton, *Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making*, 68 DUKE L.J. 1323, 1327 (2019). Because class arbitrations can be long and complicated, arbitrators have financial incentives to preside over them. See *id.* Consistent with the theory that arbitrators further their own pecuniary self-interest, I determined that the odds of a decision-maker finding that a “silent” arbitration provision permitted class claims was 63.7 times higher in arbitration than in court. See *id.* at 1371.

hinge on these principles: implied delegation clauses, “weaponized” Arbitration Rules, and mass arbitrations. Drawing on the analysis in Part II, it urges judges to attack these issues by paying closer attention to the ways in which private procedural rulemaking diverges from the baseline of state-created procedures.

A. IMPLIED DELEGATION CLAUSES

Rent-A-Center opened the door for drafters to use delegation clauses to “clearly and unmistakably” entrust the arbitrator with deciding whether the arbitration should proceed.³²¹ Recently, many courts have found that the mere fact a contract selects a particular set of Arbitration Rules serves as an implied delegation clause. This section criticizes these holdings and explains why they should not apply to forced arbitration.³²²

321. See *supra* text accompanying notes 171–73.

322. This Section expands upon arguments I originally made in David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 418–22 (2018). Unfortunately, as this Article was in the editing stage, the Court missed an opportunity to clarify this oft-litigated topic when it granted certiorari in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19-963, 2020 WL 3146679, at *1 (U.S. June 15, 2020). This case’s tortured path began when Archer and White and Pelton and Crane (which was Henry Schein’s predecessor-in-interest) entered into an arbitration agreement that both incorporated the AAA Rules and exempted “actions seeking injunctive relief.” *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 491 (5th Cir. 2017), *vacated and remanded*, 139 S. Ct. 524 (2019). Archer and White then sued Henry Schein seeking damages and an injunction. See *id.* Henry Schein fired back by arguing that the arbitrator should decide the issue of whether the injunction claim was subject to arbitration. See *id.* For reasons that are not relevant to this Article, the case bounced from the Fifth Circuit to the Court and then back to the Fifth Circuit. See *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 277 (5th Cir. 2019), *cert. denied*, No. 19-1080, 2020 WL 3146709 (U.S. June 15, 2020), *and cert. granted*, No. 19-963, 2020 WL 3146679 (U.S. June 15, 2020). In 2019, the Fifth Circuit held that the carve out for injunctive relief trumped the AAA’s Rules and meant that courts (not arbitrators) had the power to rule on arbitrability. See *id.* at 281–82. This opinion then sparked dueling petitions for certiorari. Henry Schein asked the Court to decide whether the Fifth Circuit interpreted the relationship between the carve out and the AAA Rules correctly. See *Petition for a Writ of Certiorari at *2, Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19-963, 2020 WL 529195 (U.S. Jan. 31, 2020). In response, Archer and White filed a conditional cross-petition on the broader topic of “[w]hether an arbitration agreement that identifies a set of arbitration rules to apply if there is arbitration clearly and unmistakably delegates to the arbitrator disputes about whether the parties agreed to arbitrate in the first place.” *Conditional Cross-Petition for a Writ of Certiorari at *1, Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19-963, 2020 WL 1391910 (U.S. Mar. 2, 2020). Although Archer and White’s framing of the case teed up the implied delegation conundrum perfectly, the Justices only granted Henry Schein’s petition. See *Henry Schein*, 2020 WL 3146679, at *1.

In the past decade, dozens of courts have tried to square *Rent-A-Center* with Arbitration Rules that empower arbitrators to decide arbitrability. As noted above, most providers have adopted some version of the principle that an arbitrator possesses “the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.”³²³ Federal appellate courts have unanimously held that this language passes the baton to the arbitrator to decide arbitrability.³²⁴

Yet these decisions are thinly reasoned,³²⁵ and most of them feature negotiated deals between equally powerful parties.³²⁶ Thus, state

323. See *supra* text accompanying note 316.

324. See *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11–12 (1st Cir. 2009); *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Petrofac, Inc. v. DynMcDermott Petrol. Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1075 (9th Cir. 2013); *Terminix Int’l Co. v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) *abrogated on other grounds by* *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 129 S. Ct. 524 (2019).

Some courts exempt “narrow” arbitration clauses, reasoning that when the parties list particular claims that are “subject to arbitration, and arbitrability [i]s not one of th[em],” then selecting a provider’s code does “not clearly and unmistakably submit the issue of arbitrability to arbitration.” *Burlington Res. Oil & Gas Co. v. San Juan Basin Royalty Tr.*, 249 S.W.3d 34, 40 (Tex. App. 2007); see also *Turi v. Main St. Adoption Servs., LLP*, 633 F.3d 496, 509 (6th Cir. 2011), *abrogated on other grounds by* *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) (same result where parties incorporated AAA rules but only agreed to arbitrate claims “regarding fees”); *Temple v. Best Rate Holdings LLC*, 360 F. Supp. 3d 1289, 1299 (M.D. Fla. 2018) (explaining that a “simple reference to the [AAA] rules is insufficient to constitute ‘clear and unmistakable’ language evincing an intent to have an arbitrator decide arbitrability where the arbitration provision is ‘narrow’ rather than ‘broad’”).

Likewise, there is a circuit split about whether choosing a set of Arbitration Rules empowers the arbitrator to engage in clause construction and decide whether an arbitration clause allows class arbitration. Compare *Chesapeake Appalachia, LLC v. Scout Petrol, LLC*, 809 F.3d 746, 764 (3d Cir. 2016) (holding that incorporating the AAA Rules does not delegate clause construction to the arbitrator); *Dell Webb Cmty., Inc. v. Carlson*, 817 F.3d 867, 876–77 (4th Cir. 2016) (same); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599–600 (6th Cir. 2013) (same); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972–73 (8th Cir. 2017) (same), with *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 635–36 (5th Cir. 2012) (reaching the opposite conclusion); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1248 (10th Cir. 2018) (same); *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1233 (11th Cir. 2018) (same).

325. See Brief of Amicus Curiae Professor George A. Bermann in Support of Respondent at 6, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) (No. 17-1272), 2018 WL 4908389, at *6 [hereinafter *Henry Schein Brief*] (“[N]one of these decisions provides any reasoning whatsoever as to how or why incorporation of such arbitral rules meets the clear and unmistakable evidence test.”).

326. See, e.g., *Oracle*, 724 F.3d at 1075 (“[A]s long as an arbitration agreement is

supreme courts, appellate courts, and federal district judges disagree about whether to extend the implied delegation logic to adhesion contracts.³²⁷

Compounding this confusion, the federal circuit courts seem to have misunderstood the relevant Arbitration Rules. As mentioned above, providers give arbitrators “the power to rule on [their] own jurisdiction” in order to save time by resolving arbitrability challenges when a dispute is already pending in *arbitration*.³²⁸ But the implied delegation cases arise in *court*. With the possible exception of JAMS, providers do not mandate that judges defer to arbitrators in this context.³²⁹ Indeed, traditional delegation clauses often make arbitral

between sophisticated parties to commercial contracts, those parties shall be expected to understand that incorporation of [a provider’s] rules delegates questions of arbitrability to the arbitrator.”); *see also Contec*, 398 F.3d at 207 (holding questions of the arbitrability of a contract between two companies to be arbitrable); *Petrofac*, 687 F.3d at 674–75 (same); *Terminix*, 432 F.3d at 1332–33 (same); *Qualcomm*, 466 F.3d at 1374 (same). *But cf. Awuah*, 554 F.3d at 11 (holding the same for franchise agreements between a commercial janitorial services contractor and its franchisee janitors); *Fallo*, 559 F.3d at 877–78 (holding the same for enrollment agreements between a for-profit vocational school and its students); *Brennan v. Opus Bank*, 796 F.3d 1125, 1131 (9th Cir. 2015) (holding the same for an employment contract between a bank and an executive-level employee).

327. *Compare* *Eiess v. USAA Fed. Sav. Bank*, 404 F. Supp. 3d 1240, 1253–54 (N.D. Cal. 2019) (refusing to find that incorporated Arbitration Rules function as an implied delegation clause when the non-drafting party is not “sophisticated”); *Meadows v. Dickey’s Barbecue Rests. Inc.*, 144 F. Supp. 3d 1069, 1079 (N.D. Cal. 2015) (same); *Tompkins v. 23andMe, Inc.*, No. 13-CV-05682, 2014 WL 2903752, at *11 (N.D. Cal. June 25, 2014) (same), *aff’d*, 840 F.3d 1016 (9th Cir. 2016); *Allstate Ins. Co. v. Toll Bros.*, 171 F. Supp. 3d 417, 427–29 (E.D. Pa. 2016) (same), *granting arb.* 2016 WL 1086720 (E.D. Pa. Mar. 21, 2016); *Glob. Client Sols., LLC v. Ossello*, 367 P.3d 361, 369 (Mont. 2016) (same), *with Zenelaj v. Handybook Inc.*, 82 F. Supp. 3d 968, 973 (N.D. Cal. 2015) (finding that “nearly every [post-*Oracle*] decision in the Northern District of California . . . has consistently found effective delegation of arbitrability regardless of the sophistication of the parties” and holding as such); *Cordas v. Uber Techs., Inc.*, 228 F. Supp. 3d 985, 992 (N.D. Cal. 2017) (quoting *Zenelaj*, 82 F. Supp. 3d at 973) (same); *Bernal v. Sw. & Pac. Specialty Fin., Inc.*, No. C 12-05797, 2014 WL 1868787, at *5 (N.D. Cal. May 7, 2014) (same); *Kimble v. Rhodes Coll., Inc.*, No. C-10-5786, 2011 WL 2175249, at *2, *4 (N.D. Cal. June 2, 2011) (same); *Anderson v. Pitney Bowes, Inc.*, No. C 04-4808, 2005 WL 1048700, at *3, *5 (N.D. Cal. May 4, 2005) (same); *Mercadante v. XE Servs., LLC*, 78 F. Supp. 3d 131, 139 (D.D.C. 2015) (same), *enforcing arb. ord.* 2016 WL 4435173 (D.D.C. Aug. 19, 2016), *dismissing for failure to prosecute* 323 F.R.D. 76 (2017); *Willis v. Dixie Elec. Power Ass’n*, No. 18-CV-30, 2020 WL 601389, at *4 (S.D. Miss. Feb. 5, 2020) (same); *Howard v. Rent-A-Ctr., Inc.*, No. 10-CV-103, 2010 WL 3009515, at *3–6 (E.D. Tenn. July 28, 2010) (same).

328. *See supra* text accompanying notes 316–17.

329. *See* Henry Schein Brief, *supra* note 325, at 9–10 (observing that express delegation clauses “address[] the role of both courts and arbitrators and clearly state[] that the [arbitral] tribunal had not only primary, but indeed exclusive, authority to resolve

authority over arbitrability “exclusive,” but the AAA, ADR Services, CPR, and the Forum do not expressly foreclose courts from ruling on the topic.³³⁰ Making matters worse, because arbitration administrators create their codes in hermetic isolation, judges cannot consult hearing transcripts or committee reports to correct this apparent mistake.

However, even if it is too late to alter how the Arbitration Rules affect sophisticated parties, courts should not imply delegation clauses into adhesion contracts. Recall that Arbitration Rules become part of a contract under the doctrine of incorporation by reference.³³¹ This venerable common law principle permits terms that are not physically attached to an agreement to breathe life into it.³³² Critically, though, this extrinsic language does *not* become part of the transaction unless the parties “had knowledge of and assented to [it] . . . so that the incorporation will not result in surprise or hardship.”³³³ There can be little doubt that consumers and employees neither know about nor consent to byzantine procedural codes written by arbitration administrators. As one district court put it, “[I]ncorporating forty

issues of arbitrability”). JAMS’s rule may be different because it goes further than its competitors by stating that “arbitrability disputes . . . shall *be submitted to and ruled on by the [a]rbitrator.*” *JAMS Streamlined Rules*, *supra* note 162, at r. 8(b) (emphasis added).

330. See *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 789 (Ct. App. 2012) (“[N]othing in the AAA rules states that the AAA arbitrator, as opposed to the court, shall determine those threshold issues, or has *exclusive* authority to do so, particularly if litigation has already been commenced.”); *GAC Int’l, LLC v. Roth Licensing, LLC*, No. 15-CV-2375, 2019 WL 174972, at *4 (finding that ADR Services’ rules permit prior judicial rulings to preclude an arbitrator ruling on a dispute’s arbitrability); *CPR Rules*, *supra* note 54, at r. 8; *FORUM*, *supra* note 54, at r. 3.1(E); *Drahozal & Rutledge*, *supra* note 69, at 1125 (“[T]hese rules do not affirmatively exclude the jurisdiction of courts over the arbitrability challenge.”); RESTATEMENT (THIRD) U.S. L. OF INT’L COM. ARB. § 2.8 cmt. b (2019) (expressing skepticism about whether incorporating a set of Arbitration Rules “foreclose[s] judicial consideration of [arbitrability]”).

331. See *supra* text accompanying notes 123–24.

332. See, e.g., *Beacon Sales Acquisition, Inc. v. Bd. of Trs. of the Teamsters Indus. Emps. Pension Fund*, 425 F. Supp. 3d 377, 390 (D.N.J. 2019) (quoting *Bd. of Trs. of the Int’l Union of Operating Eng’rs Loc. 825 Pension Fund v. River Front Recycling Aggregate, LLC*, No. CV 15-8957, 2016 WL 6804869, at *4 (D.N.J. Nov. 16, 2016)) (explaining that incorporation by reference “allows parties to ‘incorporate contractual terms by reference to a separate, contemporaneous document’”, *voluntarily dismissing appeal* 2020 WL 3816323 (3d Cir. Feb. 20, 2020).

333. *State ex rel. U-Haul Co. of W. Va. v. Zakaib*, 752 S.E.2d 586, 598 (W. Va. 2013); *Beacon Sales*, 425 F. Supp. 3d at 390 (quoting *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 447 (3d Cir. 2003)) (“Incorporation by reference is proper where . . . incorporation of the document will not result in surprise or hardship.”); cf. 11 WILLISTON ON CONTRACTS § 30:25 (4th ed. 2020) (“[I]t must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms . . .”).

pages of arbitration rules into an arbitration clause is tantamount to inserting boilerplate inside of boilerplate”³³⁴ Moreover, allowing the arbitrator to decide whether the arbitration should proceed is the epitome of a “surprise or hardship.” As noted, arbitrators have financial incentives to reject arbitrability challenges so they can bill for entertaining the merits of a case.³³⁵ For these reasons, the idea of an implicit but “clear and unmistakable” delegation clause should be an oxymoron.

Finally, removing courts from the arbitrability calculus would make procedural rulemaking by providers even more fraught. As noted above, the primary check on runaway arbitration administrators has been judicial review of arbitration clauses.³³⁶ Yet, if virtually every contract that selects a set of Arbitration Rules automatically bypasses this safeguard, providers will have little reason to create even-handed procedures that balance both parties’ interests.³³⁷ Thus, in the context of forced arbitration, courts should require more than an allusion to the Arbitration Rules to permit arbitrators to decide arbitrability.

B. WEAPONIZED ARBITRATION RULES

To reiterate, the Federal Rules are trans-substantive and uniform,³³⁸ but the Arbitration Rules are procedural shapeshifters.³³⁹ Recently, corporations have recognized that they can exploit this

334. *Allstate Ins. Co. v. Toll Bros.*, 171 F. Supp. 3d 417, 429 (E.D. Pa.), *granting arb.* 2016 WL 1086720 (E.D. Pa. Mar. 21, 2016). Likewise, a California appellate panel highlighted the disconnect between the “clear and unmistakable” test and obscure dispute resolution provisions:

[T]he reference to AAA rules does not give an employee, confronted with an agreement she is asked to sign in order to obtain or keep employment, much of a clue that she is giving up her usual right to have the court decide whether the arbitration provision is enforceable. Assuming that an employee reads the arbitration provision in the proposed agreement, notes that disputes will be resolved by arbitration according to AAA rules, and even has the where-withal and diligence to track down those rules, examine them, and focus on the particular rule. . . . [It] tells the reader almost nothing.

Ajajian, 137 Cal. Rptr. 3d at 789.

335. See *supra* text accompanying note 320.

336. See *supra* text accompanying notes 214–19.

337. See generally *Drahozal & Zyontz*, *supra* note 161, at 298 (“[A]rbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.” (quoting Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2(4) (2009))).

338. See *Marcus*, *supra* note 95, at 394–99.

339. See *supra* Part II.B.

difference through what I call “weaponized rules”—selecting codes intended for one form of dispute for the wrong type of case. This section argues that a drafter’s use of weaponized rules should be grounds for striking down the entire arbitration agreement and permitting the matter to proceed in court.

Weaponized rules emerged in the late 2000s. They were pioneered by firms that hire independent contractors. Even if these workers are technically not “employees,” their lawsuits are “unquestionably . . . employment case[s].”³⁴⁰ Yet drafters realized that they did not necessarily need to subject independent contractors to a provider’s employment dispute rules. Instead, they began to select the AAA’s Commercial Rules or JAMS’s Comprehensive Rules in agreements with workers.³⁴¹ Likewise, some merchants and insurers—which the AAA classifies as participants in “consumer” markets³⁴²—have ditched the institution’s Consumer Rules for its Commercial Rules.³⁴³ These defendants all seek the same thing: to escape the orbit of the Due Process Protocols and Minimum Standards that govern forced arbitration.

To make the stakes here concrete, suppose an independent contractor signs an arbitration clause that prohibits awards of attorneys’ fees and later files a Title VII claim. The choice of Arbitration Rules will have a profound impact on her lawsuit. For one, if either the AAA’s or JAMS’ Employment Rules apply, the company must pay most filing and

340. *Rodriguez v. Castforce, Inc.*, 190 F. Supp. 3d 1148, 1154 (N.D. Ga. 2016).

341. *See, e.g.*, *Kauffman v. U-Haul Int’l, Inc.*, No. 16-CV-04580, 2018 WL 4094959, at *2 (E.D. Pa. Aug. 28, 2018) (incorporating the AAA Commercial Rules into an agreement with an independent contractor), *settlement approved*, 2019 WL 1785453 (E.D. Pa. Apr. 24, 2019); *Andresen v. IntePros Fed., Inc.*, 240 F. Supp. 3d 143, 147 (D.D.C. 2017) (same); *Rodriguez*, 190 F. Supp. 3d at 1153 (same); *Loewen v. Lyft, Inc.*, 129 F. Supp. 3d 945, 950 (N.D. Cal. 2015) (same); *Afrasiabi v. Hern*, No. H033744, 2009 WL 3979004, at *8 (Cal. Ct. App. Nov. 20, 2009) (incorporating the JAMS Comprehensive Rules into an agreement with an independent contractor); *see also Baker v. Anytime Labor-Kan., LLC*, No. 16-CV-00447, 2016 WL 9245464, at *1 (W.D. Mo. Dec. 13, 2016) (incorporating the AAA Commercial Rules into an employment agreement); *Sanchez v. Homebridge Fin. Servs., Inc.*, No. 17-CV-1267, 2018 WL 1392892, at *2 (E.D. Cal. Mar. 20, 2018) (incorporating the JAMS Comprehensive Rules into an employment agreement); *cf. Nix v. Cabco Yellow, Inc.*, No. G056110, 2019 WL 3714528, at *1 (Cal. Ct. App. Aug. 7, 2019) (incorporating the option for either the JAMS Comprehensive or Streamlined Arbitration Rules into an agreement with an independent contractor).

342. *See* AAA CONSUMER RULES, *supra* note 162, at r. 1(a).

343. *See, e.g.*, *Tompkins v. 23andMe, Inc.*, No. 13-CV-05682, 2014 WL 2903752, at *1, *17 (N.D. Cal. June 25, 2014) (finding that the seller of genetic testing kit which costs less than \$100 selected the AAA Commercial Rules), *aff’d*, 840 F.3d 1016 (9th Cir. 2016); *Auden v. IHC Health Sols. Indep. Holding Grp.*, No. 1 CA-CV 18-0191, 2019 WL 438798, at *2 (Ariz. Ct. App. Feb. 5, 2019) (finding that an insurer chose the AAA Commercial Rules).

administrative costs and all of the arbitrator's fees.³⁴⁴ Conversely, the AAA Commercial and JAMS Comprehensive Rules divide these costs equally among the parties.³⁴⁵ Likewise, AAA Employment Rule 39(d) allows arbitrators to "grant any remedy or relief that would have been available . . . had the matter been heard in court."³⁴⁶ In turn, because Title VII allows prevailing plaintiffs to recover their attorneys' fees,³⁴⁷ Rule 39(d) would permit the arbitrator to ignore the "no attorneys' fees" provision in the arbitration agreement. By contrast, AAA Commercial Rule 47(a) limits arbitrators to awards that are "within the scope of the agreement of the parties" and thus would require the arbitrator to enforce the "no attorneys' fees" clause.³⁴⁸

Courts have uniformly failed to recognize these adverse consequences for plaintiffs. In fact, some do not find weaponized rules troubling at all. For instance, in *Baker v. Anytime Labor-Kansas, LLC*, a class of plaintiff workers sued a temporary employment agency for age discrimination.³⁴⁹ They had each signed an arbitration clause that applied to "disputes arising out of [their] employment," but, paradoxically, selected the AAA's Commercial Rules.³⁵⁰ Although they argued that "arbitration would be cost prohibitive," a federal judge in Missouri disagreed, opining that "[t]he arbitration agreement is not void solely because it . . . imposes a financial duty on Plaintiffs."³⁵¹

344. See AM. ARB. ASS'N, *supra* note 221; *JAMS Employment Rules*, *supra* note 162, at r. 31(c).

345. See AAA COMMERCIAL RULES, *supra* note 23, at r. R-54; JAMS COMPREHENSIVE RULES, *supra* note 54, at r. 31; cf. Answering Brief of Plaintiffs/Appellees at 14, *Auden*, No. 1 CA-CV 18-0191, 2019 WL 438798 (Ariz. Ct. App. Feb. 5, 2019) 2018 WL 3578803 (introducing expert testimony that arbitrating against an insurer would cost the plaintiff up to \$92,620 under the AAA's Commercial Rules but a mere \$200 under the AAA's Consumer Rules).

346. AAA EMPLOYMENT RULES, *supra* note 162, at r. 39(d).

347. 42 U.S.C. § 2000e-5(k).

348. AAA COMMERCIAL RULES, *supra* note 23, at r. R-47(a); *In re Arb. Between Prudential-Bache Secs., Inc. & Depew*, 814 F. Supp. 1081, 1084 (M.D. Fla. 1993) (finding that, under the AAA Commercial Rules, "arbitrators may award attorneys' fees only when the contract . . . includes an express authorization"); *Beacon Towers Condo. Tr. v. Alex*, 42 N.E.3d 1144, 1148 (Mass. 2016) (holding an arbitrator erred by awarding attorney's fees under the AAA Commercial Rules where "no provision of the parties' agreement . . . authorizes the award of attorney's fees").

349. No. 16-CV-00447, 2016 WL 9245464, at *1 (W.D. Mo. Dec. 13, 2016).

350. *Id.*

351. *Id.* at *6; see also *Tompkins v. 23andMe, Inc.*, No. 13-CV-05682, 2014 WL 2903752, at *17 (N.D. Cal. June 25, 2014) (rejecting cost-based challenge to arbitration clause that accompanied sale of consumer product but selected AAA Commercial Rules), *aff'd*, 840 F.3d 1016 (9th Cir. 2016); *Loewen v. Lyft, Inc.*, 129 F. Supp. 3d 945,

Even judges who have been more alarmed by weaponized rules have let drafters off with a proverbial slap on the wrist. For example, in *Rodriguez v. Castforce, Inc.*, a district court in Georgia compelled arbitration of an independent contractor's claim under the Commercial Rules but also implored the company "if it is genuinely interested in a fair arbitration, [to] consent to . . . proceeding under the AAA Employment Rules."³⁵² Likewise, in *Kauffman v. U-Haul International, Inc.*, a Pennsylvania federal court held that choosing the AAA's Commercial Rules for an employment dispute was unconscionable because it saddled the plaintiff with thousands of dollars of additional fees.³⁵³ But rather than voiding the entire arbitration agreement, the court struck down the contract's incorporation of the Commercial Rules "only insofar as [it] require[s] the plaintiff] to pay arbitration fees and costs."³⁵⁴ The judge then enforced the rest of the contract as written,³⁵⁵ overlooking the fact that the AAA's Employment and Commercial Rules diverge on topics other than the allocation of expenses, such as the arbitrator's power to award remedies.³⁵⁶

963 (N.D. Cal. 2015) (rejecting cost-based challenge to arbitration clause in independent contractor agreement that selected the AAA Commercial Rules).

352. 190 F. Supp. 3d 1148, 1154 (N.D. Ga. 2016). *Rodriguez* was a Fair Labor Standards Act case brought by an independent contractor. *See id.* at 1150–51. The company chose the AAA Commercial Rules, *id.* at 1153, and also specified that the prevailing party could recover its litigation expenses, *see id.* at 1150. The plaintiff argued that the arbitration provision was unconscionable for two reasons: unlike the Employment Rules, the Commercial Rules required him to pay hefty fees and would permit the defendant to recover attorneys' fees from him if it prevailed. *See id.* at 1153–54. The court conceded that the plaintiff's "unconscionability argument has some persuasive appeal," but held that the arbitrator should resolve it. *Id.* at 1154.

353. No. 16-CV-04580, 2018 WL 4094959, at *7 (E.D. Pa. Aug. 28, 2018) (reasoning that the plaintiff "would incur fees of \$1,550 just to file his claim, exclusive of hourly arbitrator fees, room rental fees, or other fees" and "[b]y contrast, under the AAA's Employment Arbitration Rules . . . the employee's fees are capped at \$200").

354. *Id.* at *11.

355. *See id.*

356. *See supra* text accompanying notes 340–41. *Compare* AAA EMPLOYMENT RULES, *supra* note 162, at r. 39(d), *with* AAA COMMERCIAL RULES, *supra* note 23, at r. R-47. In 2017, the AAA tried to curtail the use of weaponized rules. The institution added a footnote to its Commercial Rules that specified that it "will apply the Employment Fee Schedule to any dispute between an individual employee or an independent contractor . . . and a business or organization and the dispute involves work or work-related claims." AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, at r. R-1 n.* (2017), https://www.adr.org/sites/default/files/CommercialRules_Web_FINAL_2.pdf [<https://perma.cc/K9N4-LPFB>]. Although this was a huge step in the right direction, it has not solved the problem of weaponized rules. Two years later, the Attorneys General of twelve states wrote a letter to the AAA complaining about "instances where AAA arbitrators have applied the Commercial Fee Schedule to workers classified as independent contractors." Letter to Ann Lesser, Vice President, Am. Arb.

Contrary to these opinions, a corporation's use of weaponized rules should invalidate the whole arbitration agreement. There is well-developed body of law on severance: the choice between merely deleting offensive terms and compelling arbitration or nullifying the core agreement to arbitrate and permitting the plaintiff to proceed in court.³⁵⁷ Unfair terms cannot be severed—and thus must drag the entire arbitration agreement down with them—if they either (1) are “an essential part of the parties’ agreement”³⁵⁸ or (2) demonstrate that the drafter was “overreaching.”³⁵⁹

Weaponized rules meet both elements of this test. For one, the Arbitration Rules are the heart of the arbitral scheme. Indeed, as even *Kauffman* acknowledged, the selection of the AAA's Commercial Rules “cannot be severed in its entirety because, in its absence, there would be no rules at all governing the arbitration.”³⁶⁰ Thus, ill-fitting Arbitration Rules are “not simply a minor logistical consideration ancillary to the arbitration agreement.”³⁶¹ And on top of this, weaponized rules are rank efforts by firms to capitalize on their superior knowledge of

Ass'n 2 (Nov. 12, 2019), <https://oag.ca.gov/system/files/attachments/press-docs/AAA-Arbitration-Data-Letter.pdf> [<https://perma.cc/CZ2E-PNEJ>]. Moreover, the forgiving fee schedule of the Employment Rules is not the only difference between various types of Rules. See *supra* text accompanying notes 340–41.

357. See *Kauffman*, 2018 WL 4094959, at *9 (“[A] court may sever, or remove, an offensive term from a contract so long as doing so does not disturb the primary intent of the parties’ agreement. . . . [Y]ou don’t cut down the trunk of a tree because some of its branches are sickly.” (quoting *Spinetti v. Serv. Corp. Int’l*, 324 F.3d 212, 213 (3d Cir. 2003))); *id.* at *10 (finding that an arbitration provision must be struck down entirely in cases where “the sickness has infected the trunk, we must cut down the entire tree” (quoting *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 271 (3d Cir. 2003))).

358. *Id.* at *10; *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 18MD2836, 2018 WL 6795836, at *3 (E.D. Va. Dec. 6, 2018) (citing *Huber v. Huber*, 470 A.2d 1385, 1389–90 (1984)) (“An unenforceable contract provision may not be severed, if that provision is an essential part of the parties’ agreement.”); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 696 (Cal. 2000) (“If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract . . .”).

359. *Trompeter v. Ally Fin., Inc.*, 914 F. Supp. 2d 1067, 1076 (N.D. Cal. 2012); *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 85 (D.C. Cir. 2005) (“[T]he more the employer overreaches, the less likely a court will be able to sever the provisions and enforce the clause . . .”); *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 207 (3d Cir. 2010) (reasoning that severance is not warranted “if the agreement demonstrates that the employer sought to impose arbitration on the employee as an inferior, one-sided forum”).

360. *Kauffman*, 2018 WL 4094959, at *11.

361. *Galey v. World Mktg. All.*, 510 F.3d 529, 533 (5th Cir. 2007).

providers' codes.³⁶² Weaponized rules do not randomly drift into contracts; rather, companies strategically deploy them to deter claims. When courts respond by bending over backwards to preserve the commitment to arbitrate, they "encourage[] those who draft contracts of adhesion to overreach."³⁶³ For these reasons, judges should rethink their approach to weaponized rules.

C. MASS ARBITRATIONS

Recently, a striking new trend has surfaced in the post-class action landscape. Plaintiffs have filed thousands of individual cases—"mass arbitrations"—against the same company. This Section explains how the Arbitration Rules both helped create this phenomenon and will dictate its future.

As discussed above, in the 2010s, the Court used the FAA to sound "the death knell for consumer and employment class actions."³⁶⁴ By making class arbitration waivers unimpeachable, opinions like *Concepcion* prevented plaintiffs from banding together and forced them to arbitrate their own low-value claims individually.³⁶⁵ These decisions are widely regarded as one of the boldest deregulatory strokes since *Lochner v. New York*.³⁶⁶ After all, "the *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30."³⁶⁷

Nevertheless, in a jaw-dropping development, plaintiffs' lawyers have found a way to "turn[] class action waivers into a weapon for [consumers and] workers."³⁶⁸ They have achieved this goal by doing what nobody expected them to do: *arbitrating*. For example: in 2018, 12,501 drivers filed their own claims against Uber, alleging that it had violated the Fair Labor Standards Act (FLSA) by failing to pay them

362. See *supra* text accompanying notes 284–91.

363. *McKee v. AT&T Corp.*, 191 P.3d 845, 861 (Wash. 2008).

364. Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. CAL. L. REV. 103, 116 (2015); see also *supra* text accompanying notes 177–81.

365. 563 U.S. 333, 350–52 (2011).

366. See Burt Neuborne, *Ending Lochner Lite*, 50 HARV. C.R.-C.L. L. REV. 183, 184–85 (2015) (placing *Concepcion* in a string of Supreme Court contract rights-based holdings that "ha[ve] the effect of diluting the real-world value of post-*Lochner* reforms").

367. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

368. See Alison Frankel, *After Postmates Again Balks at Arbitration Fees, Workers Seek Contempt Order*, REUTERS (Dec. 2, 2019), <https://www.reuters.com/article/legal-us-otc-massarb/after-postmates-again-balks-at-arbitration-fees-workers-seek-contempt-order-idUSKBN1Y62E8> [https://web.archive.org/web/20200908161304/https://www.reuters.com/article/legal-us-otc-massarb/after-postmates-again-balks-at-arbitration-fees-workers-seek-contempt-order-idUSKBN1Y62E8].

minimum wage and overtime.³⁶⁹ Similarly, in 2019, 5,257 food couriers for Postmates brought their own burst of FLSA arbitrations.³⁷⁰ And other mass arbitrations have targeted AT&T,³⁷¹ Chipotle,³⁷² DoorDash,³⁷³ FanDuel,³⁷⁴ Lyft,³⁷⁵ Sallie Mae,³⁷⁶ and Macy's.³⁷⁷

The plaintiffs' attorneys who engineered many of these cases are trying to capitalize on a loophole in the Arbitration Rules.³⁷⁸ As one beleaguered corporate lawyer complained, these principles are "not designed for mass, identical filings."³⁷⁹ The problem is simple: the AAA Commercial Rules and JAMS Comprehensive Rules require defendants to pay a deposit of about \$1,500 for each arbitration.³⁸⁰ Of course, that

369. Petition for Order Compelling Arbitration at 2, *Abadilla v. Uber Techs., Inc.*, No. 18-CV-7343 (N.D. Cal. Dec. 5, 2018).

370. *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1248 (N.D. Cal. 2019); *see also* Frankel, *supra* note 368.

371. *See* Chandrasekher & Horton, *supra* note 231, at 54 (noting that data disclosed by the AAA reveals that one plaintiffs' firm filed nearly 1,100 arbitrations on the same day against the telecommunications giant).

372. *See* Michael Hiltzik, *Chipotle May Have Outsmarted Itself by Blocking Thousands of Employee Lawsuits over Wage Theft*, L.A. TIMES (Jan. 4, 2019), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-chipotle-20190104-story.html> [<https://perma.cc/A6SK-YX6F>] (observing that the restaurant chain "may have to defend against hundreds, even thousands, of arbitration claims").

373. *See supra* text accompanying notes 29–33.

374. *See* Alison Frankel, *FanDuel Wants N.Y. State Court to Shut Down Mass Consumer Arbitration*, REUTERS (Jan. 14, 2020), <https://www.reuters.com/article/us-otc-fanduel/fanduel-wants-n-y-state-court-to-shut-down-mass-consumer-arbitration-idUSKBN1ZD2SK> [<https://web.archive.org/web/20200908163049/https://www.reuters.com/article/us-otc-fanduel/fanduel-wants-n-y-state-court-to-shut-down-mass-consumer-arbitration-idUSKBN1ZD2SK>].

375. *See* Andrew Wallender, *Corporate Arbitration Tactic Backfires as Claims Flood In*, BLOOMBERG L.: DAILY LAB. REP. (Feb. 11, 2019), <https://news.bloomberglaw.com/daily-labor-report/corporate-arbitration-tactic-backfires-as-claims-flood-in> [<https://perma.cc/PN97-75LQ>] (reporting that Lyft faces 3,420 individual arbitrations).

376. *See* Chandrasekher & Horton, *supra* note 231, at 54 (finding that plaintiffs' lawyers filed about 200 arbitrations against the lender over the span of a few weeks).

377. *See id.* at 55 (reporting that one plaintiffs' firm filed nearly 1,600 arbitrations against Macy's over about a month's time).

378. The filings against AT&T and Sallie Mae may be motivated by other arbitration agreement structures. Before the Court made class arbitration waivers bullet-proof, these companies created monetary incentives for plaintiffs to arbitrate low-value claims on an individual basis. *See id.* at 16. By doing so, the firms sought to defuse objections that their class waivers were unfair. *See id.*

379. *See* Frankel, *supra* note 374.

380. *See* AAA COMMERCIAL RULES, *supra* note 23, at r. R-56(a) ("The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee . . ."); JAMS COMPREHENSIVE RULES, *supra* note 54, at r. 31(b) ("JAMS requires that the Parties deposit the fees and expenses for the Arbitration from time to time during the course

cost is manageable if a corporation gets sued a handful of times. But it swells to epic proportions when it is multiplied by the number of individuals who once would have constituted a class. For example, the mass arbitrations against Uber resulted in JAMS sending the company a \$18,000,000 bill,³⁸¹ and the AAA demanded more than \$11,000,000 from Postmates.³⁸²

Three points about mass arbitrations are worth highlighting. First, their social value is debatable. On the one hand, the very definition of a shakedown. The plaintiffs' firms behind them seem to be trying to extort a quick settlement for less than the amount of the AAA or JAMS deposits. Indeed, as DoorDash objected, the flood of filings are a brazen attempt to "extract[] a multi-million dollar payment . . . in order to *avoid* the administrative costs of these arbitrations, irrespective of the merits."³⁸³ But on the other hand, the plaintiffs are merely asking firms to obey the terms of their own contracts. The fact that businesses are resisting individual arbitration—the very dispute resolution methodology they have championed—suggests that their arbitration clauses are not meant to *resolve* claims, but rather to *thwart* claims.³⁸⁴ Thus, as the judge presiding over the DoorDash case observed, there is "poetic justice" in class arbitration waivers starting to boomerang on drafters.³⁸⁵

Second, mass arbitrations fall into a doctrinal Bermuda Triangle. Most companies have responded to these salvos of complaints by refusing to pay their deposits.³⁸⁶ In turn, the AAA and JAMS have invoked

of the proceedings and prior to the Hearing."); Frankel, *supra* note 368 ("Under the current rules of the American Arbitration Association, it costs companies \$1,900 to begin arbitrating with a single worker . . ."); Alison Frankel, *Uber Tells Its Side of the Story in Mass Arbitration Fight with 12,500 Drivers*, REUTERS (Jan. 16, 2019), <https://www.reuters.com/article/legal-us-otc-uber/uber-tells-its-side-of-the-story-in-mass-arbitration-fight-with-12500-drivers-idUSKCN1PA2PD> (describing the \$1,500-per-case charge for Uber to initiate individual arbitrations with JAMS).

381. Frankel, *supra* note 380.

382. Frankel, *supra* note 368.

383. Respondent DoorDash, Inc.'s Opposition to Motion for Temporary Restraining Order at 2–3, *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062 (N.D. Cal. Nov. 2019) (No. 9-CV-07545). Adding credence to this theory, the same attorneys—Chicago-based Keller Lenkner—appear to be behind many mass arbitrations. See Frankel, *Uber*, *supra* note 380.

384. Frankel, *supra* note 368 ("The companies . . . believed that when they insisted that workers surrender their right to sue or arbitrate as a group, they'd effectively squelched workers' claims.").

385. *Id.*

386. See, e.g., Petitioner's Motion for an Order for Postmates to Show Cause Why It Should Not be Held in Civil Contempt at 1, *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246 (N.D. Cal. 2019) (No. 19-CV-03042).

provisions in their Arbitration Rules that allow them to terminate cases when a party defaults on an invoice.³⁸⁷ What happens next is unclear. Some courts have held that a defendant who declines to participate in arbitration either materially breaches the arbitration agreement³⁸⁸ or waives its right to arbitration.³⁸⁹ Yet the remedy in these situations is to allow the plaintiffs to refile their complaints in court.³⁹⁰ This is not what the architects of mass arbitrations want. Instead, to maximize their settlement leverage, they have asked judges to issue “order[s] compelling [the defendant] to tender its share of the arbitration fees to the arbitrator so that the arbitrations may proceed.”³⁹¹

387. See *id.* at 2; see also AAA COMMERCIAL RULES, *supra* note 23, at r. 57(f) (“If . . . the parties have failed to make the full deposits requested within the time provided . . . the arbitrator, or the AAA if an arbitrator has not been appointed, may terminate the proceedings.”); JAMS COMPREHENSIVE RULES, *supra* note 54, at r. 31(a)–(b) (establishing sanctions for failure to deposit or pay fees).

388. See *Brown v. Dillard’s, Inc.*, 430 F.3d 1004, 1012 (9th Cir. 2005) (reasoning that any other approach would give employers “an incentive to refuse to arbitrate claims brought by employees in the hope that the frustrated employees would simply abandon them”); *Roach v. BM Motoring, LLC*, 155 A.3d 985, 995 (N.J. 2017) (“A failure to advance required fees that results in the dismissal of the arbitration claim deprives a party of the benefit of the agreement.”); *Nadeau v. Equity Residential Props. Mgmt. Corp.*, 251 F. Supp. 3d 637, 641 (S.D.N.Y. 2017) (“[D]efendant materially breached the Arbitration Agreement and therefore cannot use the Agreement to compel arbitration.”); *cf. Pre-Paid Legal Servs., Inc. v. Cahill*, 786 F.3d 1287, 1294–95 (10th Cir. 2015) (applying this analysis to an *employee* who refused to pay arbitration fees).

389. See *Cinel v. Barna*, 142 Cal. Rptr. 3d 329, 335 (Ct. App. 2012) (“[B]y refusing to agree among themselves to pay the fees of the nonpaying parties, both plaintiff and defendant . . . have waived the arbitration agreement”); *Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828, 838 (Miss. 2003) (concluding that a party “waived its right to arbitration by refusing to pay its one-half of the costs associated with filing and administrative fees”). *But see Fogal v. Stature Constr., Inc.*, 294 S.W.3d 708, 718 (Tex. App. 2009) (holding that waiver means “attempt[ing] to ‘have it both ways by switching between litigation and arbitration,’” and that merely failing to pay fees does not meet this test (quoting *Perry Homes v. Cull*, 258 S.W.3d 580, 597 (Tex. 2008) (Johnson, J., concurring))). In addition, effective January 1, 2020, California has regulated a company’s non-payment of arbitration expenses by statute. See CAL. CIV. PROC. CODE § 1281.97(a) (West 2020) (declaring that, in consumer and employment arbitrations, a drafter’s failure to pay fees to a provider thirty days or more after they are due is both a material breach of the arbitration agreement and waiver of right to compel).

390. See *Roach*, 155 A.3d at 995 (holding that non-payment of fees “bars the breaching party from later compelling arbitration”). *But see* CAL. CIV. PROC. CODE § 1281.97(b)–(d) (allowing consumers and employees to either (1) compel arbitration with breaching drafters and recover attorneys’ fees therefrom, or (2) to obtain sanctions from a court).

391. Order Granting in Part and Denying in Part Petitioners’ Motion to Compel Arbitration and Respondent’s Cross-Motion to Compel Arbitration and Stay Proceedings at 1, *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246 (N.D. Cal. 2019) (No. 19-CV-

Third, one provider has suggested a solution to the mass arbitration quandary, and its proposal highlights both the promise and peril of arbitration rulemaking. In late 2019, CPR unveiled an Employment-Related Mass Claims Protocol.³⁹² CPR's regime calls for arbitrators to decide a handful of "Test Cases"—which operate like bellwether trials in mass torts—and then for the parties to conduct a global mediation in light of the results.³⁹³ CPR's lightning-fast response is a testament to the agility of privatized procedure. Indeed, a similar revision to the Federal Rules would have taken years.³⁹⁴ Yet there are also reasons for skepticism about CPR's motives. As argued earlier, arbitration administrators have incentives to please businesses.³⁹⁵ Notably, CPR's Protocol takes the wind out of plaintiffs' sails by exponentially reducing the number of deposits that defendants must pay.³⁹⁶ Moreover, the speed with which CPR acted is especially valuable for the gig economy employers who are facing mass arbitrations. Gig workers must access

03042). *Contra id.* at 12 (ordering Postmates to arbitrate over 5,257 complaints, but refusing "to compel Postmates to pay the arbitrator's fee within a prescribed time-period or to pay future invoices related to the arbitrations"). Another judge in the Northern District of California required DoorDash to arbitrate 5,010 claims, Order Re Motion to Compel Arbitration, Motion to Stay Proceedings, and Motion to Seal at 5, *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062 (N.D. Cal. 2019) (No. 9-CV-07545) [hereinafter *DoorDash Order*], and heaped scorn on the company's tactics:

For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. . . . The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. . . . This hypocrisy will not be blessed, at least by this order.

Id. at 7–8.

392. INT'L INST. FOR CONFLICT PREVENTION & RESOL., WHAT IS THE EMPLOYMENT-RELATED MASS CLAIMS PROTOCOL? (2019), <https://www.cpradr.org/dispute-resolution-services/employment-related-mass-claims-documents/emp-mass-claims-protocol> [<https://perma.cc/C5MY-24DH>].

393. *Id.* at 2–4.

394. *Pending Rules and Forms Amendments*, U.S. CTS., <https://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments> [<https://perma.cc/X2RS-836S>] ("An amendment to a federal rule generally takes about three years.").

395. See *supra* text accompanying notes 223–30.

396. See Alaina Lancaster, "Poetic Justice": Judge Alsup Berates DoorDash for Trying to Escape Its Own Arbitration Agreement, LAW.COM: RECORDER (Nov. 26, 2019), <https://www.law.com/therecorder/2019/11/26/poetic-justice-judge-alsup-berates-door-dash-for-trying-to-escape-its-own-arbitration-agreement> (reporting that, under CPR's new protocol, DoorDash would only have to arbitrate 10 claims, instead of the 2,236 filed claims accounting for \$4.275 million in fees).

an app—and assent to its terms—every time they accept a shift.³⁹⁷ Thus, these companies can amend their arbitration clauses in real time.³⁹⁸ In fact, one day after the AAA terminated the arbitrations against DoorDash, the business changed the Arbitration Rules in its contact from the AAA's to CPR's.³⁹⁹

Given this background, it is not surprising that some disquieting facts about CPR's Protocol have recently come to light. Apparently, the provider developed Arbitration Rules with defendants in pending mass arbitrations. For example, the law firm representing both DoorDash and Postmates reached out to CPR to complain about mass arbitrations in the spring of 2019.⁴⁰⁰ That fall, CPR sent multiple drafts of the Protocol to the firm, which offered "comments, questions, and recommendations" thereon.⁴⁰¹ In return, CPR "asked to be notified when the new DoorDash contracts providing for arbitration under CPR were distributed."⁴⁰² Thus, there is evidence that an arbitration provider changed its rules to attract new clients—precisely what we should expect from allowing companies to act as procedural rule-makers.

397. *Id.* ("You've set up this draconian system where before they can get their first job at 5 a.m. you have to click through," [Judge] Alsup said.").

398. Courts generally permit companies to amend the terms of their contracts unilaterally, provided that the original agreement includes a provision that authorizes such changes. *See* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 623–30 (2010) (tracking the history and development of unilateral modification clauses and their associated jurisprudence); Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 9 (2010) (noting a provision in a credit card agreement stating "We may change any term, condition, service or feature of your account at any time. We will provide you with notice of the change to the extent required by law." (quoting *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 277 (Ct. App. 1998))).

399. Lancaster, *supra* note 396.

400. *See* DoorDash Order, *supra* note 391, at 7 ("Gibson Dunn reached out to CPR to discuss issues DoorDash was having with filing fees for mass arbitrations . . ."); *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1248 (N.D. Cal. 2019) (noting representation of "Gibson, Dunn & Crutcher LLP, Los Angeles, CA, for Respondent [Postmates]" in a mass arbitration case pending during the same period as *Abernathy v. DoorDash*).

401. DoorDash Order, *supra* note 391, at 7; *see also* Ross Todd, *Gibson Dunn, DoorDash's Ties to New Mass Arbitration Protocol Can Be Explored, Judge Says*, LAW.COM: RECORDER (Dec. 20, 2019), <https://www.law.com/therecorder/2019/12/20/Gibson-dunn-doordashs-ties-to-new-mass-arbitration-protocol-can-be-explored-judge-says/>. For whatever it's worth, CPR asserts that it also "talked to lots of other sources, including plaintiffs' lawyers." Alison Frankel, *Ex-Judge Atop Controversial Mass Arbitration Program: Give It a Chance to Work*, REUTERS (Dec. 23, 2019), <https://www.reuters.com/article/us-otc-massarb/ex-judge-atop-controversial-mass-arbitration-program-give-it-a-chance-to-work-idUSKBN1YR1ZI> [<https://web.archive.org/web/20200909020703/https://www.reuters.com/article/us-otc-massarb/ex-judge-atop-controversial-mass-arbitration-program-give-it-a-chance-to-work-idUSKBN1YR1ZI>].

402. *See* DoorDash Order, *supra* note 391, at 7.

CONCLUSION

For eighty years, the Federal Rules have dominated the field of civil procedure. Yet some of the most influential rulemaking today occurs through the looking glass, in arbitration. Procedural codes written by arbitration providers do not subscribe to many of the basic assumptions of their public counterparts, such as inclusive drafting processes, trans-substantivity, uniformity, and trying to balance efficiency and accuracy. Some of these differences expand parties' dispute resolution options and foster procedural ingenuity. But others exacerbate the power imbalance that is inherent in forced arbitration. By being sensitive to the benefits and costs of the Arbitration Rules, courts can do a better job assimilating private dispute resolution into the civil justice system.